Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

HEADWATER RESEARCH, LLC, PLAINTIFF, VS. VERIZON COMMUNICATIONS INC., INC., ET AL., DEFENDANTS.	)(	CIVIL ACTION NO. 2:23-CV-352-JRG-RSP MARSHALL, TEXAS MAY 30, 2025 9:00 A.M.
HEADWATER RESEARCH, LLC, PLAINTIFF, VS. T-MOBILE US, INC., ET AL., DEFENDANTS.	)(	CIVIL ACTION NO. 2:23-CV-379-JRG-RSP MARSHALL, TEXAS MAY 30, 2025 9:00 A.M.

PRETRIAL HEARING

BEFORE THE HONORABLE ROY S. PAYNE

UNITED STATES MAGISTRATE JUDGE

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(Proceedings recorded by mechanical stenography, transcript produced on a CAT system.)

09:00:28 COURT SECURITY OFFICER: All rise.

09:00:28 THE COURT: Good morning. Please be seated.

09:00:31 For the record, we're here for the pretrial conference in Headwater Research versus Verizon Communications, which is 2:23-352 on our docket, and Headwater Research versus T-Mobile USA, Inc., et al., which is Case No. 2:23-379 on our docket.

09:01:00 Would counsel state their appearances for the record?

09:01:02 MS. FAIR: Good morning, Your Honor. Andrea Fair on behalf of Headwater. I'm joined today by Mr. Marc Fenster, Mr. Reza Mirzaie.

09:01:07 MR. MIRZAIE: Morning.

09:01:08 MS. FAIR: Mr. Kristopher Davis, Mr. Adam Hoffman, Mr. Jason Wietholter, Mr. Philip Wang, and Mr. Dale Chang. And we're ready to proceed.

09:01:20 THE COURT: All right. Thank you, Ms. Fair.

09:01:25 MR. GORHAM: Good morning, Your Honor. Tom Gorham on behalf of Defendant T-Mobile. With me here this morning on behalf of Verizon is Mr. Deron Dacus. We, again, have a number of Gibson Dunn lawyers appearing on behalf of both Verizon and T-Mobile this morning. We have Ms. Kate Dominguez, Mr. Brian Rosenthal.

09:01:42 MR. ROSENTHAL: Good morning.

09:01:44 MR. GORHAM: Mr. Josh Krevitt.

09:01:44 MR. KREVITT: Good morning.
09:01:45 MR. GORHAM: Mr. Charlie Sim.
09:01:45 MR. SIM: Good morning.
09:01:46 MR. GORHAM: Mr. Brian Rosenthal, Mr. Rob Vincent,
09:01:50 and Ms. Hannah Bedard -- excuse me, Andrew Robb, and
09:01:54 Ms. Hannah Bedard. And we're ready to proceed, Your Honor.
09:01:57 THE COURT: All right. Thank you, Mr. Gorham.
09:02:09 As counsel know, both of these cases are on the
09:02:12 June 23 trial docket for Judge Gilstrap. The Court has
09:02:18 designated the Verizon case ahead of the T-Mobile case.
09:02:24 Both of them are currently behind the Empire versus Samsung
09:02:32 case, but obviously with the Verizon case second on that
09:02:41 June 23 docket, there's certainly an excellent chance it'll
09:02:45 be reached at that time.
09:02:46 I have looked over the record in the case,
09:02:56 including the recent representation that the Plaintiff was
09:03:01 going to reduce the claims down to four claims for trial.
09:03:09 With that and the other information in the pretrial order
09:03:12 about the witnesses and the like, I think that 11 hours per
09:03:16 side will be sufficient for the case. But if either party
09:03:23 wants to offer argument on that, this would be the time to
09:03:28 hear it.
09:03:32 Mr. Fenster?
09:03:34 MR. FENSTER: Good morning, Your Honor. I would
09:03:39 request the Court's consideration for 12 hours. And the

basic reason is while we have four claims at issue and one Defendant, this case involves, for the '541 and the '613 patent, multiple products. And so we're accusing for each of the '541 and '613 patents phones from Apple, Samsung, and Motorola, at least.

So there are -- there's a whole host of products, both Android and iOS, that will require some going through -- you know, some time to get through. And so that's why we'd request 12.

THE COURT: All right. Thank you, Mr. Fenster.

MR. ROSENTHAL: Your Honor, Brian Rosenthal on behalf of the Defendants.

I think that if the case remains the size that it is now, we would join in that request. And by that, I mean there are some issues -- I hope we can discuss some of those issues later today, but there are some issues that we think are rifle shots and actually do substantially reduce the scope of the case. For instance, knocking out a patent, knocking out products.

If the case remains the size that it is today, we would join in the Plaintiff's request for 12 hours a side if the Court's amenable to that. I do think that there are some complications.

We could, of course, you know, revisit that question after the summary judgment motions are disposed

of. I think that will bear a little bit on how complex the case is.

THE COURT: All right. Thank you, Mr. Rosenthal.

I will take those arguments into account and consider that further as we work through the other issues in the case. But at this point, I'll leave it at 11 hours per side.

On June 23, the Court will take up jury selection first on that Monday. There'll be 30 minutes per side allocated for voir dire, the first up to three minutes of which can be devoted to a non-argumentative barebones overview of what's at issue in the case. I would stress the non-argumentative part of that description.

At the end of that process, eight jurors will be selected. There will be four peremptory challenges per side, which are exercised in a written blind simultaneous fashion, meaning that both sides turn in their written peremptory challenges at the same time.

After the peremptory challenges, the Court will take up the challenges -- or, I'm sorry, before the peremptory challenges, the Court will take up the challenges for cause on the record that's been established.

Opening statements will proceed thereafter, 30 minutes per side.

Closing arguments, the parties should expect 40

09:07:02 minutes per side, although you can take that matter up with
09:07:06 Judge Gilstrap, and it'll depend a little bit on where the
09:07:16 case is in the daily schedule as to whether there can be
09:07:20 more time.
09:07:20 Plaintiffs are authorized to withhold up to half
09:07:21 of their time for rebuttal, but it has to be less than half
09:07:25 actually.
09:07:25 As you know, Judge Gilstrap will plan to be in
09:07:31 chambers daily at 7:30. If there are issues that affect
09:07:37 the trial that starts that morning, I think the pretrial
09:07:43 order that the parties have agreed to has a proper -- a
09:07:54 proper protocol for disposition of the -- of any disputes
09:08:02 that arise during it.
09:08:04 There were a few issues in the pretrial order that
09:08:07 I think were not agreed to. I'm trying to -- I think the
09:08:27 agreement in the pretrial order includes notifying the
09:08:29 Court of existing disputes by an email to the designated
09:08:35 law clerk by 10:00 p.m. that night. You may have agreed to
09:08:39 an earlier time. If so, that's, of course, fine.
09:08:42 The one thing I would add to your agreement is
09:08:50 that in addition to notifying the Court by that 9:00 or
09:08:55 10:00 p.m., depending on what your agreement was, you
09:09:01 should plan to have available for Judge Gilstrap the
09:09:03 following morning when you're going to present the dispute
09:09:08 a jointly prepared three-ring binder that has a copy of the

09:09:13 demonstrative, for instance, if that's what the issue is,
09:09:16 or if it's an exhibit, a copy of that -- a short narrative
09:09:23 from each side, roughly half a page, setting out what the
09:09:27 dispute is in preparation for a conference with the Judge
09:09:36 at 7:30 or thereabouts.
09:09:39 The plan will be for the jury to report around
09:09:42 8:30 daily.
09:09:47 Lunch is provided for the jury so that the lunch
09:09:50 break can be kept short to roughly 45 minutes.
09:09:56 The Court will plan to adjourn by around 6:00 p.m.
09:10:02 each day in order to accomplish the completion of the trial
09:10:09 in that week.
09:10:13 If there are disputes about deposition
09:10:18 designations, we'll try and resolve any for the first day
09:10:24 of trial, if there are any, during the pretrial process,
09:10:34 but the situation -- the protocol that you agreed to in the
09:10:37 pretrial order is acceptable for resolution of the
09:10:45 disputes, but I think the parties had a disagreement about
09:10:51 when they need to make those issues known.
09:10:57 There was in Paragraph 11 and 12 of the pretrial
09:11:04 order a section on the trial management procedures. There
09:11:11 was a dispute about whether 12:30 p.m. two days before or
09:11:19 6:30 p.m. three days before would work. I think that the
09:11:29 Court has in the past adopted the 12:30 two days before.
09:11:36 And I see no reason not to adopt that this time.

09:11:40 If the Defendant wants to offer some argument in
09:11:43 support of the 6:30 deadline three days before, I'll be
09:11:51 happy to hear it. But, otherwise, I'll go with what we've
09:11:55 used before.
09:11:55 Mr. Rosenthal?
09:11:56 MR. ROSENTHAL: Your Honor, we'll live with that.
09:11:57 Thank you, Your Honor.
09:11:58 THE COURT: All right. Then with that
09:12:06 clarification, the pretrial order will be adopted.
09:12:16 Mr. Rosenthal, I note that there was a request for
09:12:19 a separate provision regarding the use of errata when a
09:12:26 deposition is being offered.
09:12:30 Do you want to provide your argument on that, or
09:12:32 is that something that has been resolved?
09:12:34 MR. ROSENTHAL: Your Honor, it has not been
09:12:37 resolved. I think it's a fairly ministerial issue.
09:12:42 Mr. Vincent, if you don't mind, can just briefly address
09:12:46 what the issue is.
09:12:47 THE COURT: All right.
09:12:47 MR. ROSENTHAL: Thank you.
09:12:48 MR. VINCENT: Your Honor. Robert Vincent for
09:12:53 Defendants.
09:12:53 The issue is straightforward. There are
09:12:55 depositions and deposition designations to be played in
09:12:58 this case. Those depositions, errata were made through the

09:13:03 normal errata process that bear on the testimony that
09:13:07 Headwater wants to designate in the trial.
09:13:10 For completeness, we believe that the errata
09:13:13 should be read to the jury, to the extent it bears on the
09:13:16 testimony that Headwater has designated. That's why we
09:13:19 have an errata process in the deposition process. That's
09:13:23 why we have those. And so for completeness, to get the
09:13:28 complete testimony and context, the errata are necessary to
09:13:34 be read, again, to the extent that Headwater wants to
09:13:37 designate testimony that relates to that errata.
09:13:40 THE COURT: All right. And, Mr. Vincent, are you
09:13:43 familiar with the errata that are at issue in these
09:13:48 depositions? Are -- is it simply what you would consider
09:13:53 the correction of a typo, or is it to do with the witness
09:13:59 wanting to clarify or change their answer in some way?
09:14:05 MR. ROSENTHAL: I think that can be corrected. If
09:14:09 wrong -- I think there is a -- there are typos, and there
09:14:11 are also, you know, clarifications or explanations of
09:14:16 testimony.
09:14:17 Again, I don't have that errata in front of me
09:14:19 right now, but in -- but I think it involves -- not simply,
09:14:25 you know, a misspelled word, but it does go to what the
09:14:29 witness testified as their testimony under oath. And,
09:14:33 again, that's what the errata process is for, so that the
09:14:36 witness can control the testimony that they provided under

09:14:39 oath.

09:14:40 And if Headwater has specific objections to
09:14:43 specific errata, then they can raise those, but my
09:14:48 understanding that this was a global objection to reading
09:14:52 errata at all in the -- for witness designations.

09:14:57 THE COURT: It seems to me that perhaps the best
09:15:01 way to handle this is like an objection in the designated
09:15:08 testimony. And if the other side -- whichever side is
09:15:16 wanting to use the errata, if the other side feels that
09:15:21 it's a misuse of the errata process, then I think probably
09:15:27 the best way is to meet and confer about that and then
09:15:31 raise it as an objection during the deposition designation
09:15:38 process.

09:15:39 Do you have any reason to think it should be done
09:15:44 differently?

09:15:45 MR. VINCENT: No, Your Honor, that's the process
09:15:47 that we would propose.

09:15:48 THE COURT: All right. Then thank you,
09:15:51 Mr. Vincent.

09:15:52 MR. VINCENT: Thank you, Your Honor.

09:15:53 THE COURT: If the Plaintiff has a different idea
09:15:54 on it, I'd be happy to hear it.

09:15:57 Mr. Wang?

09:15:59 MR. WANG: Thank you, Your Honor.

09:16:01 Just to address this briefly, we were concerned

about errata being read for the point that you mentioned, Your Honor, substantive changes in testimony. And I believe what Mr. Vincent said, I partly agree with, which is that in some prior pretrial orders, we did not have this sentence, and we could address this issue for specific designations instead of doing it the other way around to have this and do it that way.

THE COURT: Well, why don't we have the understanding be, then, that if there is no objection raised by the party offering the deposition testimony, the errata will be read where it would go in the testimony. And if there's an objection to that errata on the theory that it's not a proper use of an errata, then you would raise that with Judge Gilstrap as part of the objection process that we've been talking about.

MR. WANG: That makes sense, Your Honor, and we agree to that.

THE COURT: All right. Then the pretrial order will be deemed modified to that extent.

I wanted to also address one other procedural issue raised in that section of the pretrial order.

On Page 20 of the Verizon pretrial order, Footnote 9, there is a statement that the parties reserve the right to object to the use of pre-admitted exhibits with particular witnesses.

09:18:07 I'm not familiar with that reservation. And if --
09:18:15 I don't know if both sides are agreeing to that or if that
09:18:21 is something that one side wants to speak for. But unless
09:18:24 I have some other explanation, I'll -- I will have to
09:18:30 strike that reservation because I -- it's not consistent
09:18:34 with my understanding of the purpose of pre-admission.
09:18:40 MR. WANG: Your Honor, I can speak to this
09:18:42 briefly.
09:18:43 The parties did agree to this. And in our
09:18:45 discussions, I think what we had in mind was this idea that
09:18:49 we know that pre-admitted exhibits are pre-admitted but
09:18:53 that the parties want to reserve the right to object to
09:18:58 certain witnesses testifying about an exhibit. And what we
09:19:04 have here is, you know, not having foundation, not being
09:19:08 able to speak to the exhibit, implying expert testimony
09:19:13 through the exhibit, and so that was what we preserved
09:19:17 here.
09:19:17 But, you know, if Your Honor has concerns with it,
09:19:21 I mean, the fact that it's in a footnote, we would defer to
09:19:25 Your Honor.
09:19:25 THE COURT: Well, if what you're saying is you
09:19:28 reserve the right to object to particular questions of a
09:19:34 witness, certainly you can do that. But we're not talking
09:19:38 about an objection to the exhibit then. Is that what --
09:19:46 MR. WANG: I think that's fair. I think that's

09:19:48 fair, Your Honor, and that's why we say object to the use
09:19:54 of pre-admitted exhibits.
09:19:55 And Your Honor may be correct to identify that as
09:20:01 an objection to certain questioning or examination.
09:20:08 THE COURT: Well, I just -- I don't want it to be
09:20:10 understood that there is a reservation of the right to
09:20:13 object to a lack of foundation for an exhibit. There may
09:20:17 well be a lack of foundation for a question. And if that's
09:20:27 all you're talking about, then that's fine.
09:20:29 MR. WANG: That's what we had in mind, Your Honor,
09:20:32 and so we're happy to revise this or take it out with
09:20:35 Your Honor's guidance.
09:20:36 THE COURT: Well, I'll just -- as long as it's
09:20:40 understood, then, that what that footnote is reserving is
09:20:43 the right to object to particular questions of a witness as
09:20:53 opposed to object to the exhibit -- and that's consistent
09:21:01 with your understanding of that footnote, Mr. Wang?
09:21:05 MR. WANG: Yes, Your Honor.
09:21:06 THE COURT: Okay. Does counsel for Defendant have
09:21:09 a different understanding of that?
09:21:11 MR. ROSENTHAL: No, Your Honor, that's fine. And
09:21:13 striking it is also fine.
09:21:14 THE COURT: All right. Well, I'll just leave it
09:21:19 in there with that clarification.
09:21:20 One other similar clarification would be in

09:21:29 Paragraph 22 of that section, which is on Page 21, to just
09:21:35 clarify that the juror notebooks, as you have described
09:21:39 them, are fine, but the witness pages that have the
09:21:49 photograph of the witness should have the name but not
09:21:54 the -- not title or any other information about the
09:21:58 witness, just the witness's name. And maybe by title, all
09:22:06 you meant was if the witness carries a doctor designation,
09:22:13 to have -- that designation is fine. But saying that the
09:22:18 witness holds a particular position with a particular
09:22:21 entity is not appropriate.
09:22:24 MR. ROSENTHAL: We understand. We'll follow that.
09:22:27 THE COURT: All right. I will also note that
09:22:40 consistent with the normal practice, the parties are
09:22:43 directed to withhold the Rule 50(a) motions until after the
09:22:49 close of all evidence. I know that counsel are routinely
09:22:55 worried about waiving their objections by not asserting
09:23:01 them at each stage of the case, but the record is being
09:23:06 made clear here that there is no waiver as long as you
09:23:12 present your motions after the close of all evidence.
09:23:15 I looked through the proposed jury instructions.
09:23:26 The format that you've got them in is very helpful. There
09:23:29 are at this point still too many disputes, but I would
09:23:35 direct the parties to continue to confer about that with
09:23:38 the idea that by the time the case gets to trial, you'll
09:23:42 have the proposed instructions down to as few disputes as

09:23:51 possible.

09:23:51 The Court will hold an informal pretrial -- I'm
09:23:57 sorry, an informal jury charge conference near the close of
09:24:03 all the evidence, and then after the formal charge is
09:24:10 prepared, there'll be a formal charge conference after the
09:24:15 close of all the evidence.

09:24:16 One thing I think that all counsel here are
09:24:20 familiar with is the Court's practice of requiring that
09:24:28 witnesses and others not refer to persons by only their
09:24:32 first name. In order to keep a clear record, you can use
09:24:41 just the last name or the first and last but not the first
09:24:46 name only. And counsel are directed to advise their
09:24:48 witnesses to comply with that, as well.

09:24:50 Judge Gilstrap has a standing order on sealing the
09:24:58 courtroom and sealing parts of the transcript after the
09:25:01 trial. I would direct counsel to review that standing
09:25:08 order and follow that if there is going to be a request to
09:25:13 seal the courtroom or the transcript.

09:25:16 The gist of or one of the goals of that standing
09:25:21 order process is to group any confidential evidence so that
09:25:27 the courtroom can be sealed and unsealed as few times as
09:25:32 possible, and, of course, to be sure to advise the Court as
09:25:37 soon as the confidential portion is done so that the
09:25:40 courtroom can be reopened promptly.

09:25:43 I know that there was a deadline in the docket

09:25:53 control order of last week, I think May 23, for the jury
09:25:57 questionnaire. Has a proposed questionnaire been sent to
09:26:03 Ms. Clendening?
09:26:06 MS. FAIR: Yes, Your Honor.
09:26:07 THE COURT: Okay. Good. Thank you.
09:26:08 In that case, you can expect that the
09:26:11 questionnaire will be available for counsel on the Thursday
09:26:19 before jury selection. It'll be available in the clerk's
09:26:24 office at that time.
09:26:28 That questionnaire is made available to counsel
09:26:30 with the understanding that it will be held by counsel in
09:26:36 confidence, not copied, not distributed, and destroyed
09:26:42 after the jury has been selected.
09:26:45 If you have any questions about that,
09:26:49 Judge Gilstrap does have a standing order on the court
09:26:54 website on the use of the questionnaire and the other jury
09:26:59 lists that identify prospective jurors.
09:27:04 The goal of all of that is to protect the privacy
09:27:08 of the whole venire, as well as the ultimately empaneled
09:27:19 jury, and so we take that seriously. And we expect that
09:27:23 counsel will not use those names to perform any
09:27:25 investigation in a way that can get back to the prospective
09:27:31 jurors. We don't want them to feel that their privacy is
09:27:35 being invaded. They do a lot already for us, and so we
09:27:40 want to protect them from that.

09:27:41 In connection with the jury, as you have pointed
09:27:47 out in your pretrial order, there are jury notebooks that
09:27:53 we'll need. We'll direct the parties to deliver 12 of
09:27:56 those notebooks. That's eight for the jury and four for
09:28:02 the staff.
09:28:06 Those should be delivered to chambers also by that
09:28:14 Thursday before jury selection so that we can make sure
09:28:16 that everything in those notebooks is appropriate. You can
09:28:21 deliver those at the same time that you pick up the jury
09:28:26 questionnaires and other jury information.
09:28:28 Everything you've set out in your pretrial order
09:28:34 is appropriate, so I'll just leave it at that.
09:28:38 I also want to mention that you should be prepared
09:28:42 to provide the Court with copies of the experts' reports.
09:28:50 As you know, the Court holds experts to the four corners of
09:28:54 their reports, and that occasionally leads to objections
09:28:59 regarding whether the question to an expert is within the
09:29:04 scope of the report. Those objections often require the
09:29:11 Court to consult the reports, so you will be requested to
09:29:17 provide both a paper copy and an electronic copy of the
09:29:23 reports to the Court, and you'll get an email, as we get
09:29:27 closer to trial, about when and how that should be
09:29:31 accomplished.
09:29:31 I will emphasize that resolving those objections
09:29:38 often means sending the jury out, therefore, they can take

09:29:44 a significant amount of time. That time will be charged to
09:29:49 whichever party is unsuccessful with the objection, and,
09:29:54 therefore, you should be careful about those objections.
09:30:01 And I would encourage counsel who are examining the direct
09:30:07 examination of the expert to have a reference to the
09:30:12 expert's report handy for each question you may ask in case
09:30:19 an objection comes up.
09:30:20 If there are other issues in the pretrial order
09:30:28 that need to be resolved, and I think there are a couple, I
09:30:33 want to turn to those in a moment. Then I want to take up
09:30:39 any objections regarding witnesses, and I don't mean the
09:30:45 Daubert-type objections. I mean objections that are more
09:30:50 procedural or disclosure-based. We'll then turn to the
09:30:56 motions in limine. We'll then turn to the pre-admission of
09:31:00 exhibits.
09:31:01 And I was happy to see, if I'm understanding your
09:31:06 bucket lists that have been emailed to the Court -- if I'm
09:31:09 understanding those, it looks like the number of exhibits
09:31:14 each side has is now consistent with Judge Gilstrap's
09:31:19 standing order. If not, I'll want to hear more about that
09:31:28 when we get to them.
09:31:30 I also want to take up any deposition objections
09:31:33 that relate to depositions that the Plaintiff may use on
09:31:40 the first day on the afternoon of the 23rd. And other than
09:31:47 that, later deposition objections will need to be addressed

09:31:52 in the format agreed to in the pretrial order.

09:31:58 I mentioned yesterday to Mr. Krevitt that if there
09:32:03 is more time this afternoon, we can give the parties the
09:32:09 option of arguing some of the other motions that are
09:32:14 pending, and so we'll see what -- what time remains for
09:32:19 that.

09:32:19 Does the Plaintiff have other items that the Court
09:32:26 should put on the agenda for today?

09:32:32 MR. FENSTER: No, Your Honor.

09:32:33 THE COURT: All right. Thank you, Mr. Fenster.

09:32:36 MR. MIRZAIE: Your Honor, actually there is one
09:32:38 more item that we identified for opposing counsel in our
09:32:40 email last night, and this is the issue of indemnification.
09:32:45 You'll recall that -- we can take it up now or at the end
09:32:50 of the day.

09:32:50 THE COURT: Why don't we take it up? That's
09:32:54 the -- about the -- a Google witness?

09:32:55 MR. MIRZAIE: In this case, it's not a Google
09:32:57 witness. It would be an Apple or Samsung witness because
09:33:00 they're the vendors in this case. Sort of akin to the
09:33:04 Google's position in the 103 trial.

09:33:06 THE COURT: Okay. Well, we can -- we can take
09:33:09 that up today certainly. I'll put that on the agenda --

09:33:13 MR. MIRZAIE: Thank you.

09:33:13 THE COURT: -- as well.

09:33:14 MR. MIRZAIE: Thank you.

09:33:15 THE COURT: Anything that the Defendant wants to have on the agenda other than that?

09:33:18

09:33:20 MR. KREVITT: No, Your Honor. Thank you.

09:33:22 THE COURT: All right. Thank you, Mr. Krevitt.

09:33:23 I did see in the pretrial order some -- let's see, it appears that the Plaintiff has proposed some stipulations that are listed under the general stipulation section as disputed.

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09:34:01 Generally speaking, Mr. Wang, it takes two to stipulate.

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09:34:09 MR. WANG: Your Honor, yes, we had this -- this language in there. It was agreed to for three or four days, and then kind of the last day, Verizon raised an objection, said -- put this in blue -- and I don't know if they've articulated the objection or if they have a proposal for objecting to authenticity of documents and source code produced by Apple and Samsung.

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09:34:38 I would note that in Stipulation 4, we agreed that the parties stipulated to the authenticity of each document that on its face appears generated by a party and produced by that party.

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09:34:51 Here, this -- discovery documents and source code were produced pursuant to subpoena. I believe both parties -- or at least Headwater subpoena, and they

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produced these documents. And this stipulation also doesn't prevent the parties from objecting to admissibility under the other federal rules, 402/403, but we certainly think it's appropriate to -- for them to be deemed authentic. And we're not sure how this issue would otherwise be resolved.

THE COURT: Well, I do understand that authenticity is a low bar under Rule 901, but if there are documents that were produced by a third party but on their face they give no indication of that, there could be a legitimate issue about authenticity.

So let me hear from the Defendant on that.

Thank you, Mr. Wang.

Mr. Vincent?

MR. VINCENT: Thank you, Your Honor.

And you've identified the problem with a global stipulation to authenticity of every document that these third parties have produced. Some of these productions include third-party documents, not -- not of the party, for example, Samsung.

We have an exhibit list we've gone through painstakingly to negotiate and meet and confer on objections to certain exhibits, and we have agreed, some of these documents that have been produced by Samsung and Apple are on the joint list, we don't have objections to.

09:36:40 And so we believe it's -- it's better to address these on
09:36:45 an individual basis. If they want to use a document, we're
09:36:49 happy to have that discussion, but we think it's
09:36:52 inappropriate to provide a blanket stipulation to
09:36:54 authenticity for every single document that these third
09:36:57 parties have produced.
09:36:59 THE COURT: All right. Thank you.
09:37:01 I then find that Paragraph 6 and 7 under the
09:37:08 general stipulations are not actually stipulated to. So
09:37:15 they will be disregarded.
09:37:19 And we'll take up authenticity issues for those
09:37:25 documents --
09:37:27 MR. VINCENT: Thank you.
09:37:27 THE COURT: -- on an exhibit-by-exhibit basis.
09:37:37 Is either Plaintiff or Verizon aware of other
09:37:40 disputes about the pretrial order that need to be resolved
09:37:46 before we adopt it?
09:38:00 MR. KREVITT: Your Honor, we raised an issue in
09:38:02 the pretrial order with respect to how to handle issues for
09:38:06 the Court, 101, obviousness, double patenting, for example,
09:38:13 when and how a bench trial might be appropriate on those
09:38:16 issues.
09:38:17 THE COURT: I think, as I understand it, both
09:38:19 sides are in agreement that those issues are not proper to
09:38:23 be presented to the jury, and it's just a question of when

09:38:26 they will be decided by the Court.
09:38:29 MR. KREVITT: That's our understanding, Your
09:38:31 Honor, yes.
09:38:32 THE COURT: All right.
09:38:33 MR. WANG: Not for 101, Your Honor. We put our
09:38:35 position very clearly on -- they have the pending motion.
09:38:40 We think it should be denied. If the claims are found
09:38:44 directed to an abstract idea, which we don't think they
09:38:48 should be, that would be a Part 2 issue for the jury. And
09:38:51 I think Verizon has a novel position interpreting Alice v.
09:38:58 CLS Bank as taking this away from the jury.
09:39:02 THE COURT: You know, I am very favorably inclined
09:39:06 to the Defendants' position that it should be for the
09:39:09 Court. I'm not convinced that that's what the law
09:39:14 currently provides, but I will make sure that that is
09:39:17 addressed in connection with the motion that's directing to
09:39:23 101 now.
09:39:25 MR. WANG: Thank you, Your Honor.
09:39:29 THE COURT: All right. Other than that, the
09:39:38 pretrial order --
09:39:39 MR. DAVIS: Hold on a second, Your Honor.
09:39:40 THE COURT: Go ahead, Mr. Davis.
09:39:44 MR. DAVIS: Just one more small item. So the
09:39:44 parties raised objections to witness lists with respect to
09:39:49 the joint pretrial order, as well.

09:39:50 THE COURT: And that's the next item that I am
09:39:54 going to turn to.
09:39:55 MR. DAVIS: Oh, very well.
09:39:55 THE COURT: So you can stay up there. I'll just
09:39:58 note that the pretrial order is adopted and turn to the
09:40:06 issues regarding witnesses.
09:40:08 What are the Plaintiff's objections to the
09:40:12 Defendants' witnesses?
09:40:14 MR. DAVIS: So the witness list issue that I
09:40:19 wanted to speak about, Your Honor, has to do with a
09:40:22 timeliness issue. This is -- there's a series of witnesses
09:40:27 who are current or former Verizon employees who were
09:40:33 identified to us very, very, very late in discovery. And,
09:40:39 you know, some of those folks we were able to get to sit
09:40:42 for deposition, and so we resolved that. That's not an
09:40:48 issue that we're raising. But others, you know, we tried
09:40:51 to subpoena, but it was just so late in the game.
09:40:56 One example, Your Honor, is a person named Venkat
09:41:04 Gaddam, who was just out of the country for a month and
09:41:07 wasn't disclosed to us until the end of fact discovery, so
09:41:11 we didn't have an opportunity to take his deposition.
09:41:14 So, you know, what we've done, Your Honor, is ask
09:41:17 the other side to say -- you're not going to call them at
09:41:24 trial, you're not going to rely on them. If that's the
09:41:27 case, then it's water under the bridge. But if they are

going to rely on these folks at trial, bring former employees to trial who we've never had an opportunity to depose, what we ask is that we get that chance to do so because it's not that we squandered an opportunity, it's that the opportunity was just taken from us because of how late they were disclosed.

THE COURT: Mr. Davis, let's get specific here. I see Mr. Gaddam. What other witnesses are you complaining of?

MR. DAVIS: Yes, so it's the -- if you're looking at the same document I am, Your Honor, it's that block of five where --

THE COURT: I'm looking at Document 283-4.

MR. DAVIS: Okay. Yep, I was looking at 283-5, but that's just fine. 283-4 will work, as well.

So that will be -- so it's starting on Page 4 at Jude Munn, it's Jude Munn, Louis Chan-Lizardo, Venkat Gaddam, Barry Hoffner. That's four of them. And then I actually had another one, Your Honor. And that is Jonathan Hinz, yes. It's H-i-n-z.

THE COURT: That's on the next page?

MR. DAVIS: Oh, yes, that's right, Your Honor.

THE COURT: All right.

MR. DAVIS: Yes. They're collected all in a row with our "U," meaning "untimely objection," on -- it looks

09:43:19 like PDF Page 4 of Docket No. 283-5.
09:43:29 THE COURT: All right. I'm just using their list
09:43:32 because it has a little more information about them.
09:43:34 MR. DAVIS: Yes.
09:43:36 THE COURT: But all right. Let me see -- you are
09:43:41 representing that these five employees -- or individuals
09:43:45 were identified when?
09:43:47 MR. DAVIS: So it may vary a little bit, but all
09:43:50 of them, it's very late in discovery. You know, sometimes
09:43:56 within --
09:43:57 THE COURT: Was it five minutes until midnight on
09:44:00 the last day or --
09:44:00 MR. DAVIS: I'm sorry, Your Honor.
09:44:03 So I can -- I don't have all of those specifics
09:44:08 right now. I see at least some of those folks -- it looks
09:44:14 like two of them were disclosed to us on January 24th.
09:44:18 That would be Jude Munn and Louis Chan-Lizardo. I don't
09:44:24 believe the others were disclosed until after that.
09:44:27 We have another February 7th disclosure from
09:44:34 Verizon that includes -- I'm not sure that -- even that
09:44:40 includes -- oh, yes, I'm sorry, that does include
09:44:43 Mr. Gaddam at that point.
09:44:46 And so apologies, Your Honor, I don't have the
09:44:49 exact dates with me, but I can tell you it's very, very
09:44:54 close to within a couple of weeks.

09:45:00 And so we tried to act quickly in serving
09:45:03 subpoenas but just weren't able to get depositions from all
09:45:08 these folks.
09:45:08 THE COURT: What is your recollection as to --
09:45:12 well, I don't know -- I'll interrupt.
09:45:13 Mr. Krevitt, do you have a quick resolution for
09:45:17 us?
09:45:17 MR. KREVITT: Yes. Thank you for taking the blame
09:45:21 for the interruption by me standing up.
09:45:23 Your Honor, it's very possible that we're not
09:45:26 going to call these witnesses. The parties have reached
09:45:29 some resolutions with respect to motions in limine. It's
09:45:33 possible that with additional resolution today, we'll be in
09:45:37 a position to make a go/no go call on each one of these
09:45:43 witnesses and would suggest, therefore, that we put this
09:45:46 issue off.
09:45:46 THE COURT: All right. Thank you, Mr. Krevitt.
09:45:52 Well, Mr. Davis, why don't we proceed that way.
09:45:56 You have made the objection, and I will make sure the
09:45:59 objection gets resolved, but we'll wait and see at the end
09:46:04 of the day whether it's still a live objection or not.
09:46:06 MR. DAVIS: Thank you, Your Honor.
09:46:07 THE COURT: All right. Do you have any other
09:46:10 issues regarding witnesses other than those five?
09:46:15 MR. DAVIS: No. No, Your Honor.

09:46:18 THE COURT: All right. Thank you, Mr. Davis.

09:46:31 MR. VINCENT: Your Honor, Robert Vincent, and I'll be quick about objections that Defendants have to witnesses. Most of the objections will be resolved one way or the other through the various motions that we have.

09:46:44 Some of the witnesses, though, are directed to, for example, functionality on patents that are no longer in the case, and, for example, that we have a 30(b)(6) deponent on functionality related to the '543 patent, which is no longer in the case. Those type of witnesses, there are a few of them, but we would argue that those are irrelevant to the case at this point. And so to the extent that they involve functionality or issues that are -- that go away -- that are gone now or that go away with the MILs or summary judgment motions or Dauberts, that those issues will be resolved.

09:47:25 THE COURT: All right. So that doesn't sound like an objection that can be addressed now. Does that involve specific witnesses that you can identify so we'll know what is -- what you're raising?

09:47:43 MR. VINCENT: Yes, Your Honor. For example, Michael -- I'm going to get the name wrong -- Kondratiuk. He was a 30(b)(6) on functionality that's no longer relevant to the case.

09:47:55 THE COURT: All right. I see him on the

09:48:01 Plaintiff's witness list, which is at Document 283-1.

09:48:07 Who else?

09:48:13 MR. VINCENT: So just a list of names, Thomas

09:48:16 McArtney, Michael Schiksnis --

09:48:30 THE COURT: All right.

09:48:31 MR. VINCENT: -- Nem Kashanian, Kartik

09:48:46 Umamaheswaran -- I'm sorry, I'm going to butcher these

09:48:48 names but -- Thomas Russell.

09:49:05 THE COURT: I don't see Mr. Russell on the witness

09:49:08 list.

09:49:12 MR. VINCENT: I believe, Your Honor, they filed a

09:49:14 corrected exhibit list -- or witness list, excuse me, Your

09:49:18 Honor, at some point, trying -- attempting to add

09:49:21 Mr. Russell.

09:49:22 THE COURT: All right.

09:49:25 MR. VINCENT: Oh, I apologize, Your Honor. We

09:49:27 thought they were, but I don't believe they ended up

09:49:29 actually filing it -- that corrected witness list, I'm

09:49:36 informed.

09:49:43 THE COURT: Any other witnesses that you have an

09:49:45 objection to?

09:49:46 MR. VINCENT: Yes, Your Honor. Just on the

09:49:49 T-Mobile side, there's a Mr. Ryan McGinn, and his testimony

09:49:56 is unrelated to any functionality still in the case for

09:50:00 T-Mobile.

09:50:03 THE COURT: I'll tell you what, let -- why don't
09:50:06 we hold that, because when we get past this, we'll have to
09:50:13 take up T-Mobile issues all at the same time. So...
09:50:21 MR. VINCENT: Thank you, Your Honor.
09:50:22 THE COURT: But what you have identified now are
09:50:24 objections that are just based on relevance on your
09:50:30 understanding that the purpose of those witnesses is no
09:50:36 longer in the case?
09:50:37 MR. VINCENT: Yes, Your Honor. That's a bucket of
09:50:39 witnesses for which we believe all relevance is no longer
09:50:43 in the case.
09:50:45 THE COURT: All right. Good enough. Thank you,
09:50:52 Mr. Vincent.
09:50:54 Does the Plaintiff agree that any of the witnesses
09:51:08 that Mr. Vincent just identified are no longer going to be
09:51:12 used by the Plaintiff, or is there a difference of opinion
09:51:15 as to what the relevance of their testimony is?
09:51:18 MR. WIETHOLTER: Yes, Your Honor. There's a
09:51:20 difference of opinion.
09:51:20 And one important note, many of these witnesses --
09:51:24 in fact, I believe all of them, will be coming via
09:51:28 deposition, unless Defendants were planning on calling one
09:51:31 of these people live. So we can handle all those
09:51:35 objections as part of the deposition designation process.
09:51:38 But I will note for the record that it's our

09:51:43 position that many of those witnesses that are Verizon
09:51:46 witnesses have relevance to issues other than the '543
09:51:50 patent. And one specific name is Mr. Schiksnis.
09:51:57 Mr. Schiksnis is actually not a Verizon employee. He's a
09:52:02 Samsung employee. He was the Samsung witness who Headwater
09:52:07 subpoenaed and deposed in this case. So he has relevance
09:52:08 to the device-side functionality, which is relevant to much
09:52:12 more than just the '543. So that witness in particular is
09:52:16 very different from the rest of the batch.
09:52:23 THE COURT: All right. Well, then, thank you,
09:52:26 Mr. Wietholter.
09:52:29 Mr. Vincent --
09:52:30 MR. VINCENT: Counsel is correct. I misspoke. We
09:52:31 have a motion on Mr. Schiksnis and the late-taken
09:52:35 deposition for the Samsung witness. But, again, that will
09:52:39 be resolved through that motion practice.
09:52:41 And we are also fine with -- to the extent they're
09:52:43 introducing deposition testimony of these witnesses to
09:52:45 handle objections through that process.
09:52:47 THE COURT: All right. Well, all five of the
09:52:50 witnesses that you named are shown on the witness list as
09:52:57 by deposition. So with that understanding, we will leave
09:53:01 those objections to be resolved through the deposition
09:53:07 objection process.
09:53:09 MR. VINCENT: Thank you, Your Honor.

09:53:10 THE COURT: Thank you, Mr. Vincent.

09:53:20 All right. Then let's turn to the motions in limine. And we'll take up first Plaintiff's motions in limine.

09:53:30 MR. DAVIS: Thank you, Your Honor. Kris Davis for Plaintiff, Headwater.

09:53:42 With respect to Headwater MIL 1, happy to report there has been some narrowing.

09:53:47 So the Defendants have agreed to Parts 2 and 3 of this motion in limine so long as those conditions apply to Verizon, to T-Mobile, and to Headwater, which is fine from our perspective.

09:54:02 So that leaves Part 1 of this MIL. That relates to [redacted]. So --

09:54:13 THE COURT: Before we move on, is your understanding of Part 2, is the agreement just applicable to the Qualcomm and Fortress offers, or are you applying it more generally to any unconsummated offers?

09:54:35 MR. DAVIS: I believe just to the Qualcomm and Fortress offers.

09:54:42 THE COURT: All right. I will consider it agreed, then, with that understanding.

09:54:46 Go ahead on the first one then.

09:54:48 MR. DAVIS: And I should clarify, I don't believe there are any other unconsummated offers besides Qualcomm

and Fortress that are at issue. So I think it ends up being one and the same.

THE COURT: Well, we'll see, but it is limited to Qualcomm and Fortress.

MR. DAVIS: Understood.

THE COURT: All right.

MR. DAVIS: All right. Thank you, Your Honor.

So, again, that leaves Part 1 of the MIL. That relates to [redacted]. And the Court previously granted a MIL on this exact issue in the 422 case. For the record, that's Headwater versus Samsung, Case No. 2:22-CV-422. And this was in the 422 MIL order at Pages 2 to 3 that was attached to our motions in limine here as Exhibit 1.

The Court found that this had virtually no probative value and that it was -- what little probative value it might have was seriously outweighed by unfair prejudice. I think the Court did so because it's a salacious story that just isn't relevant to the issues in this case.

The Defendants have a new twist or two here that they say warrants different treatment. It does not. What they're -- what they're raising, Your Honor, they want to tell the jury about supposed [redacted] that misled Verizon into investing into ItsOn, which was the

operating company that licensed Headwater's patented technology.

But what they described is just plainly not financial misconduct, and we'll show you why. I'll step through it in more detail in a moment, but just at a high level, what they're referring to is deposition testimony about an email chain between Dr. Raleigh of ItsOn and a person named [redacted] who was working with Dr. Raleigh in the early stages to develop a financial model for Headwater -- or, I'm sorry, for ItsOn.

At this point in time, ItsOn is just a brand new startup. It hasn't even conducted Series A funding round, and they're working on figuring out what should -- how they should characterize the operating expenses over time and what would be an accurate way of representing that to potential investors.

So let's take a look at the email chain that gives rise to all of this. Okay. And I'll begin at the bottom, Your Honor. We also have a copy for the Court if you'd like to see.

May we hand this up to Your Honor --

THE COURT: All right.

MR. DAVIS: -- if you'd like?

So what we see is -- I think that's -- it's Johnson Exhibit 4.

09:58:04 So where this email thread begins, it's July 2009,
09:58:12 and the folks at ItsOn, including Dr. Raleigh, are
09:58:14 preparing documents for Verizon, sort of an investment
09:58:21 pitch to see if Verizon will be interested in investing in
09:58:25 ItsOn.
09:58:25 And as part of that, Verizon wants to see, not
09:58:29 surprisingly, expense plans, business revenue models,
09:58:32 et cetera. And so this is what they're working on.
09:58:37 THE COURT: Just so I can follow, is your argument
09:58:41 here, Mr. Davis, that this information that you're showing,
09:58:47 this email, would be excluded by your -- by your MIL, or
09:58:55 are you just trying to rebut their argument that they need
09:59:01 information or evidence that would be excluded by the MIL?
09:59:04 MR. DAVIS: It's a good question, Your Honor. So
09:59:07 what they want to do is bring in -- you see this reflected
09:59:10 in Page 2 of their opposition brief. They want to bring in
09:59:15 the prior -- [redacted]
09:59:19 [redacted] is exactly what
09:59:23 Your Honor excluded in the 422 case, but then they also
09:59:26 want to bring in what they're calling a second instance of
09:59:30 [redacted] testified
09:59:34 about at his deposition and what's reflected in these
09:59:38 emails.
09:59:39 We don't think -- this just is not [redacted]
09:59:44 [redacted], and I'll show you why.

09:59:46 So it's a fair question --

09:59:48 THE COURT: So would this be excluded by your MIL?

09:59:51 MR. DAVIS: Well, Your Honor, I think it should be because they're characterizing it as [redacted]. And so it just -- I can explain to you why I think it is not [redacted], but we think it's prejudicial in any event and it's a distraction. I guess maybe what we would do is tweak the MIL to say alleged [redacted]. I think -- you know, it's not actual [redacted], but it is alleged to be by Verizon in this case, and T-Mobile for that matter.

10:00:27 THE COURT: Go ahead.

10:00:28 MR. DAVIS: Okay. So, Your Honor, what we see now, this is just a few days later, and -- and we see [redacted] gets involved, and he has some experience working with companies and doing financial projections. And he is explaining that there's -- he's having a sort of debate with Dr. Raleigh about how they should characterize the operating expenses.

10:01:05 [redacted] includes sort of a fixed number for operating expenses that don't really change over time as the company develops, whereas Dr. Raleigh is saying, you know, no, I don't think that's really that -- as accurate as it should be because we think the company's going to grow, have more partnerships, and because we have more

partnerships, our operating expenses are going to grow, as well. And so Dr. Raleigh is looking for the operating expense information to be more dynamic, something that changes over time.

And so they're -- they're going back and forth. There's what -- the terminology that was used is a "fudge factor" that is -- that appeared in the financial model to show sort of this is what the operating expenses will be.

Dr. Raleigh is saying I think we should make it a more dynamic model, and so let's remove that and make it change over time.

[redacted] is saying here, you know, I think it does make sense for it to be this sort of fixed approach, but I've removed the fudge line in this version. He's also saying what you see here in the middle of the screen is, you know, I, of course, would like to make the numbers completely ground up, but that's just a level of detail that is very tough to build at this stage because it's a brand new startup. It has no products, no revenue, no real relationships at this point.

THE COURT: Mr. Davis, your presentation is convincing me that this is not something that I can address on a categorical basis as a MIL. Anything that could be understood as financial mismanagement, I think that's too vague a standard.

10:03:00 If you've got something specific -- like in the
10:03:03 422 case, what we were dealing with actually was wrongdoing
10:03:09 by a particular employee, and that was identified. And
10:03:16 maybe the MIL was written in a way that seemed broader, but
10:03:19 it was designed to deal with a specific incident.
10:03:22 MR. DAVIS: I see.
10:03:23 So what I would say, Your Honor, is that all
10:03:26 they've identified is this one particular instance, this --
10:03:32 what they call, like, fudging the financial model. I think
10:03:37 if the MIL includes this, that's sufficient for our
10:03:42 purposes at this point, Your Honor, because we don't -- we
10:03:45 don't know -- we're not aware of any other, you know,
10:03:49 allegations of financial misconduct that they want to
10:03:52 raise.
10:03:52 THE COURT: I mean, there -- in the prior case
10:03:56 that you're referring to, there was a specific allegation
10:04:03 of [redacted], and that's what
10:04:08 we were dealing with. So you're saying that this MIL --
10:04:15 this part of MIL 1 is really aimed at this event that
10:04:20 you're -- that's in this email?
10:04:22 MR. DAVIS: So I think it's -- they -- oh, no, I'm
10:04:29 sorry, no, Your Honor. This is a completely separate
10:04:32 factual event from the [redacted] that you're referring
10:04:35 to from the 422 case.
10:04:36 Verizon and T-Mobile try to link those two

10:04:40 1 together. What they say in their brief is that -- is this,
10:04:45 2 Your Honor.
10:04:45 3 THE COURT: I saw what they put in their brief. I
10:04:48 4 thought they were still addressing the issue about the
10:04:53 5 former employee from the 422 case.
10:05:00 6 MR. DAVIS: That's right, Your Honor, because this
10:05:01 7 is the same person. This is [redacted]
10:05:07 8 [redacted], as well. And
10:05:10 9 so what they're trying to show, and I think you see it in
10:05:13 10 their briefing, is that this is a pattern of [redacted]
10:05:18 11 [redacted] by ItsOn.
10:05:19 12 They say: [redacted]
10:05:25 13 [redacted] They were never disclosed to Verizon.
10:05:28 14 [redacted]
10:05:32 15 [redacted], are thus directly
10:05:35 16 relevant to contextualize this misconduct, what we're
10:05:40 17 seeing in the email, and Verizon's investments into ItsOn.
10:05:43 18 And so it's the Defendants who are trying to link
10:05:47 19 these two together.
10:05:50 20 THE COURT: Well, I don't have any problem in
10:05:53 21 saying that I'm not persuaded that the [redacted] is
10:06:00 22 relevant to contextualize this email exchange, but the
10:06:08 23 question of whether this email exchange is admissible in
10:06:15 24 this -- in this case is something that I didn't understand
10:06:21 25 your MIL was aimed at.

10:06:26 MR. DAVIS: So, Your Honor, what -- what happened
10:06:29 was we went to -- as you may have seen, our MIL 1 was a
10:06:34 multi-part MIL where we went to the other side and said:
10:06:38 The Court has already ruled on a number of issues in prior
10:06:42 Headwater cases. Will you stipulate to these MILs?
10:06:45 And the Defendants -- now they've stipulated to
10:06:49 Parts 2 and 3, but they refuse to stipulate as to Part 1.
10:06:53 They did not say at any point in time that this is what
10:06:57 factual circumstances they intended to raise, this fudging
10:07:02 of financial models, or what have you. And so that's why
10:07:06 our MIL was written in very short form. We spent just a
10:07:11 few sentences because all we thought was it was the
10:07:14 [redacted]. We said: Will you exclude -- will you
10:07:18 agree to exclude that?
10:07:19 They said: No.
10:07:20 They didn't say: No, because we have this other
10:07:25 instance of supposed fudging of financial models, and
10:07:30 that's what we want to keep in.
10:07:32 And so we saw this in their opposition brief. In
10:07:36 other words, we didn't write our opening brief to address
10:07:40 what's in their opposition brief.
10:07:44 THE COURT: Well -- so I take it that you are
10:07:53 seeking an order, as broad as it is written, that you want
10:07:58 the Court to say any alleged breach of ethical or fiduciary
10:08:05 duties is inadmissible?

10:08:06 MR. DAVIS: I think, Your Honor, that may be
10:08:12 preferable, but I think we would be fine with essentially
10:08:16 the sort of narrower 422 MIL order keeping out that
10:08:22 specific instance of [redacted]
10:08:25 [redacted]
10:08:32 [redacted].
10:08:34 If it keeps out those two instances, those are the
10:08:37 only two things that we're aware of that they would try to
10:08:40 raise.
10:08:42 THE COURT: Well, tell me why this email exchange
10:08:48 about the financial model is not relevant to their
10:08:56 investments in ItsOn.
10:08:57 MR. DAVIS: I mean, the -- I think I take your
10:09:05 point, Your Honor, that the general concept of, you know,
10:09:11 there being investments into ItsOn by Verizon and this is
10:09:17 talking about the investment into Verizon. If that's all
10:09:22 this was, that's fine from our perspective, Your Honor.
10:09:25 But it's -- it's the fact that they're
10:09:27 characterizing this as [redacted], which is just completely
10:09:31 inaccurate, and that they're trying to show this pattern of
10:09:36 [redacted] by linking it to this [redacted]
10:09:40 story.
10:09:41 THE COURT: Well, I could deal with the latter
10:09:45 part of that, but as far as whether this is something that
10:09:51 would be deemed misconduct or not, why isn't that just a

question for the jury? And, I mean, obviously, you -- you have a way to respond to it and explain it. I'm not seeing why it requires a motion in limine to address it.

MR. DAVIS: Uh-huh. So I think -- you know, there is one other issue. With respect to the Verizon case, the parties have agreed for Verizon's investments into Headwater or ItsOn to be out of the case, and so --

THE COURT: Where is that agreement reflected?

MR. DAVIS: That was just this morning in the courtroom. So it is not -- I'm not sure it's reduced to paper yet.

THE COURT: All right. Well, that might resolve this issue.

Let me interrupt you, Mr. Davis, and hear from Mr. Rosenthal on that.

MR. DAVIS: Okay. Thank you, Your Honor.

THE COURT: Thank you.

Or Ms. Dominguez, I'm sorry.

MS. DOMINGUEZ: Good morning, Judge Payne. Ms. Dominguez for Defendants.

So we agree with the Court. It sounds like the MIL originally was supposed to be targeted to [redacted]. That's what's in the title of the MIL. There's no issue there. We don't intend to raise [redacted].

Our concern was then in the body, it got -- it

10:11:30 seemed to get broader. It was talking about more amorphous
10:11:35 concepts like ethical and fiduciary duties. And we wanted
10:11:38 to be clear there are things that maybe they would
10:11:42 characterize that way that fairly come in, and that's why
10:11:43 we addressed what we did in our paper.
10:11:45 I think if Your Honor is just going to limit it to
10:11:48 [redacted], we have no issue with that, and that seems
10:11:51 like an easy way to resolve it.
10:11:54 THE COURT: And that is very helpful on the MIL.
10:11:57 Since we have spent a while talking about this email
10:12:00 exchange, is this something that you intend to offer if the
10:12:08 issue of investments by Verizon into Headwater/ItsOn is not
10:12:15 going to be an issue?
10:12:16 MS. DOMINGUEZ: So that particular exchange, if
10:12:19 there were no issue with Verizon's investments, which I
10:12:21 agree with Mr. Davis has been settled for the Verizon case,
10:12:25 then Your Honor is correct, we would not need to talk about
10:12:28 Verizon's investments, including the way those financial
10:12:30 numbers were presented to induce the investment.
10:12:32 However, they have not agreed that the Verizon
10:12:36 investments won't come in in the T-Mo case. We're hoping
10:12:39 to work that out. We discussed this morning that we would
10:12:42 continue to have discussions on that.
10:12:43 If they're still trying to bring in those Verizon
10:12:46 investments in the T-Mobile case, then certainly this would

10:12:51 be an example of evidence that -- testimony and emails that
10:12:55 contextualizes those investments.
10:12:58 THE COURT: All right. Well, we will then address
10:13:01 that when we take up separate issues in the T-Mobile case.
10:13:04 But it's fair for the Court to understand that
10:13:10 this July 27, 2009 email exchange between [redacted] and
10:13:21 Dr. Raleigh is not going to be used by the -- by Verizon?
10:13:26 MS. DOMINGUEZ: In the Verizon case, no, Your
10:13:28 Honor, because we've agreed that nothing about the Verizon
10:13:30 investments will come in.
10:13:31 THE COURT: All right. Thank you, Ms. Dominguez.
10:13:39 MS. DOMINGUEZ: Thank you.
10:13:40 THE COURT: Then I'm going to grant Motion in
10:13:43 Limine No. 1 with respect to the second and third parts as
10:13:46 agreed. And as to the first part, only as to evidence of
10:13:54 [redacted] if
10:14:04 there are -- and frankly, it won't be limited to that. But
10:14:07 as to [redacted], any remaining issues would have to be
10:14:13 addressed by seeking leave if there is something on that.
10:14:17 Mr. Davis, on the third point, you said there was
10:14:21 an agreement. Is the agreement limited to the expert's
10:14:33 relationship with the Plaintiff's law firm? Is that as far
10:14:38 as the agreement goes?
10:14:39 MR. DAVIS: Yes, that's right, Your Honor.
10:14:43 THE COURT: Because there was discussion about

should it involve clients, or should it be bilateral, but the agreement you're saying has been reached is just as to the -- what was sought in the MIL itself?

MR. DAVIS: Just that it's bilateral, Your Honor, in other words, Plaintiff's law firm and Defendants' law firm.

THE COURT: Okay.

MR. DAVIS: Sorry.

THE COURT: I didn't know if that meant your relationship to their experts and you.

MR. DAVIS: Oh, I understand.

THE COURT: We're talking about two different firms, then, and the relationship of each side's experts to their law firm?

MR. DAVIS: Correct. That's right.

THE COURT: All right. Then it will be granted to that extent.

Which takes us to your second MIL.

MR. DAVIS: All right. So Headwater's MIL No. 2 relates to the InterDigital letter of intent. We seek to exclude the letter of intent altogether. As the Court may have seen in our briefing, there's some important context from the prior cases that -- you know, between Headwater and Samsung that we think bears on this issue.

You know, in the 422 case, Your Honor, this Court

10:16:08 excluded evidence of unconsummated offers, but it allowed
10:16:12 evidence of the InterDigital letter of intent. And the
10:16:14 reason was it was -- although it was a non-binding letter
10:16:19 of intent and although it never actually materialized in a
10:16:22 deal, the Court sort of drew the line as -- it was signed
10:16:28 by Headwater, and so that's why the Court, I think,
10:16:34 decided, you know, the InterDigital letter of intent is a
10:16:37 little bit different from those unconsummated offers and
10:16:40 allowed it.
10:16:41 But there have been a couple of things that have
10:16:44 transpired since that time that we want to raise with the
10:16:46 Court and, you know, revisit this issue.
10:16:52 So in the --
10:16:53 THE COURT: Is it just the question of whether
10:16:56 speculation about why the letter of intent was not
10:17:00 consummated should be prohibited?
10:17:03 MR. DAVIS: So that's certainly a concern. We
10:17:07 think, Your Honor, that because the line-drawing is
10:17:10 extremely difficult to do, that it really makes sense to
10:17:15 exclude the exhibit altogether. And we saw that sort of
10:17:23 bear out in the 103 case between Headwater and Samsung.
10:17:28 But then there's also this additional reason that
10:17:29 we can talk about that relates to the results of the 103
10:17:38 trial and how -- the difficulty that we would have in sort
10:17:42 of fairly defending ourselves against the Defendants' point

10:17:47 that, you know, this -- the cash component of this
10:17:51 InterDigital letter of intent sets a ceiling for what the
10:17:55 patents are valued at.
10:17:59 Your Honor, needless to say, we understand and we
10:18:01 tried to convey it in our briefing, as well, that we
10:18:04 certainly understand that jury verdicts are not something
10:18:07 that is -- is normal to permit.
10:18:13 The issue we see is that the InterDigital letter
10:18:16 of intent, it's a -- it's a very particular agreement in
10:18:19 that there was a cash component and an equity component.
10:18:23 The cash component was for [redacted], but what
10:18:28 Dr. Raleigh has testified to many times for years is that
10:18:30 he valued the equity component at an amount even higher
10:18:36 than that. He thought that was actually very valuable and
10:18:40 specifically because not only did InterDigital have value
10:18:44 in itself but also that InterDigital, as part of the deal
10:18:48 if it went through, would be acquiring Headwater's 500 or
10:18:52 so patents, and Dr. Raleigh thought my patents are very
10:18:55 valuable, that's going to increase the equity value.
10:18:59 Now, what Defendants have said in -- or have tried
10:19:01 to convey in this case and others is that, well, you know,
10:19:07 Dr. Raleigh is just sort of speculating or making this up
10:19:10 because he doesn't have verdicts or large licenses or
10:19:13 something like that to support this, you know, notion that
10:19:18 it would actually add significant value to the equity

component of the deal. And the verdict in the 103 case does support Dr. Raleigh's point that his patents -- at least those patents, did have significant value.

And so what we tried to convey, Your Honor, is that we would be in a position where, you know, Defendants are getting to introduce this [redacted] amount to try to convey that that's a ceiling on what the damages should be, and, you know, we're seeking damages above [redacted], so, therefore, you know, our damages' numbers are outlandish and should be rejected.

But what -- if Dr. Raleigh could fairly defend himself, he would be able to say, well, some of my patents have, in fact, you know, been found to be infringed, valid, and worth hundreds of millions of dollars.

And so that's the difficulty we have is that, you know, we -- we appreciate that, you know, ordinarily, we could not admit evidence that, you know, in another Headwater case there was this large verdict, but the particular facts here make it so that, you know, we should, in fairness, be able to defend ourselves against the allegations that Defendants have about this.

So that's sort of an additional reason, Your Honor, beyond the speculation point, that we think it makes sense to exclude the LOI altogether.

The issue with respect to speculation, I'm also

happy to speak about. We tried to quote from the trial transcript in our briefing that Your Honor may have seen. What transpired there is that, you know, there was a MIL order, as Your Honor knows, in the 103 case where the -- where Samsung was prohibited from speculating about why the InterDigital deal was not consummated.

THE COURT: And the Court decided that Samsung did not speculate.

MR. DAVIS: I'm sorry, and Judge Gilstrap decided that?

THE COURT: Yeah.

MR. DAVIS: Yes, you're correct, Your Honor.

Now, Judge Gilstrap did also say that he thought that they got to -- 99.9 percent of the way there. Respectfully, we disagree. We think they did cross the line.

But the fact that we're either at 99.9 percent or we're over the line, it sort of indicates that, you know, we would -- at minimum, we think we should have some more guardrails on this if the Court is inclined to let the InterDigital letter of intent come into evidence at all. We think some more specificity of guardrails would be helpful.

I think what Your Honor saw in that transcript was that Samsung, because they thought this was so important,

that they ended Dr. Raleigh's cross-examination with this point -- with these couple of questions, saying, you know: Well, didn't InterDigital get to, you know, due diligence, look into the validity of these patents? And then followed by didn't the deal fall through?

Yes, it fell through.

Okay. No further questions.

Now, we think that does insinuate that there's a causal relationship between InterDigital looking at validity of the patents and them not -- not going through with the deal as a result of that.

THE COURT: And that caused the jury to reject your claims?

MR. DAVIS: No, Your Honor.

THE COURT: Oh, the jury handled that appropriately?

MR. DAVIS: I understand, Your Honor. They did. And we appreciate that.

But I do think -- you know, we were very concerned about it in the moment, and we're -- we're grateful that it didn't ultimately, you know -- well, I guess who knows. We didn't get our full damages request, but in any event, we certainly take your point, Your Honor, that they didn't award [redacted], for example.

But I think this is the difficulty that we just

don't want to have the -- the line-drawing of what does it mean to speculate. You know, it may be helpful if there's some additional guardrail of something like they don't get to refer to InterDigital looking at the validity of the patents or performing diligence on the patents and then linking that to the deal not falling through -- or not going through.

THE COURT: Well, I understand the argument. I continue to feel that the InterDigital letter of intent is something that is fair game in the case. It's not just because it was signed but because it represents a position that Headwater has actually taken that relates to the value of the -- of the patents, and whereas mere offers that were unconsummated do not represent a position by Headwater.

But unless the Defendant wants to try and talk me out of it, I'm going to make the same ruling that -- that the Defendant will be prohibited from offering or implying any speculation about why the letter of intent was not consummated. And I understand that that may be a hard line to draw, but I'm confident that the Court can -- can observe it. But I am not going to exclude reference to the letter of intent itself.

I also do not accept the proposition that the letter of intent justifies introduction of evidence about a non-final verdict in another case. And I would

10:26:04 direct you to steer clear of that unless you get leave of
10:26:08 Court to go there.
10:26:09 MR. DAVIS: Understood, Your Honor.
10:26:10 THE COURT: All right. Does the Defendant want to
10:26:16 argue against the grant of MIL No. 2 to the extent I've
10:26:19 mentioned?
10:26:20 MR. KREVITT: No, Your Honor.
10:26:21 THE COURT: All right. Then I'll -- I'll grant
10:26:26 Motion in Limine No. 2 only to the extent of disallowing or
10:26:30 prohibiting any argument or evidence implying speculation
10:26:38 about why the letter of intent was not consummated, and
10:26:43 obviously that's something that would require leave to go
10:26:46 there.
10:26:48 That takes us -- before we turn to Motion in
10:26:53 Limine No. 3, we'll take the morning recess. I'm going to
10:26:58 try to keep it to a minimum because I'm going to have to
10:27:02 break for lunch at 11:30.
10:27:06 So anyway, we'll take a 10-minute recess.
10:27:10 COURT SECURITY OFFICER: All rise.
10:27:11 (Recess.)
10:27:11 COURT SECURITY OFFICER: All rise.
10:27:12 THE COURT: Thank you. Please be seated.
10:39:16 Mr. Fenster, are you ready for the next motion in
10:39:20 limine?
10:39:20 MR. FENSTER: Good morning, Your Honor. I'll be

addressing Headwater's Motion in Limine No. 3.

THE COURT: All right.

MR. FENSTER: And, specifically, this relates to testimony -- excluding testimony from a prior case about different patents that involved a different limitation that would be confusing to discuss here. And specifically, Your Honor, I would give you an example.

If we can pull up the first slide.

So, Your Honor, the '976 patent, which is listed above, that was at issue Headwater versus Samsung 422 case. The '613 patent is at issue in this case.

The specific limitation that was at issue in the '976 patent was interacting in the device display foreground. That limitation does not appear in any of the patents, either the '541 or the '613 patent at issue in this case.

There was specific testimony from the inventor, James Lavine, and from the expert, Dr. Rick Wesel, regarding that limitation. It would be confusing to have -- to allow Verizon to cross-examine or to introduce either the Lavine testimony by deposition or to cross-examine Dr. Wesel with his opinions or testimony regarding that limitation that -- from the 422 case that does not appear in this case. And that's really the specific testimony that we're seeking to exclude with

10:41:18 Motion in Limine 3.

10:41:18 And if you can go to the next slide, this, Your
10:41:24 Honor, is trial testimony from the 422 case. It was the
10:41:31 introduction of testimony from James Lavine by deposition,
10:41:35 and specifically it's that last Q&A: Do you believe
10:41:39 there's a distinction between a determination as to whether
10:41:41 an application is running in the foreground or background
10:41:45 versus a determination as to whether an application is
10:41:48 interacting in the device display foreground with the user?

10:41:52 And he answers: Yeah, there's a big difference.

10:41:57 That testimony, as -- is literally directed to a
10:42:02 specific limitation that does not appear in this case and
10:42:06 would be confusing to introduce it in this case.

10:42:09 There was similar testimony with respect to
10:42:12 questioning by Dr. Rick Wesel, and while we agree that he
10:42:20 should -- it's fair to cross-examine him with materials and
10:42:25 testimony from the 422 case, in general, this -- where
10:42:32 there's a difference in language in his testimony was
10:42:34 directed to a particular limitation that was not at issue
10:42:38 here, we think it would be prejudicial and confusing rather
10:42:42 than probative.

10:42:43 THE COURT: So what you're seeking to exclude is
10:42:47 just questions that are directed to a specific claim
10:42:52 limitation that's not being asserted in this case?

10:42:58 MR. FENSTER: Yes, with a slight tweak, Your

10:43:01 Honor, that we're seeking to exclude introduction of
10:43:04 testimony or cross-examine -- cross-examination using
10:43:08 testimony or materials that were directed to a specific
10:43:11 limitation that is not at issue in this case.
10:43:14 THE COURT: What the Defendants raise in their
10:43:17 opposition is that that they want to be able to ask about
10:43:23 testimony regarding products that are common to both.
10:43:28 MR. FENSTER: And I agree that that's fair game,
10:43:31 Your Honor. To the extent that Dr. Wesel testified about
10:43:35 Android functionality that was not specifically in the
10:43:37 context of or directed to the particular limitation "device
10:43:45 display foreground," we're fine with that.
10:43:47 Where the questioning was specific to a particular
10:43:49 limitation that was not at issue here, we think it would be
10:43:52 confusing and prejudicial because his testimony there was
10:43:56 directed to device display foreground. That doesn't appear
10:44:00 in this case, and it would require us to unpack the
10:44:05 different -- the difference in the language and that that
10:44:09 testimony was in a different case, a different patent,
10:44:12 et cetera.
10:44:13 THE COURT: All right.
10:44:15 MR. FENSTER: Thank you, Your Honor.
10:44:16 THE COURT: Thank you, Mr. Fenster.
10:44:20 MS. DOMINGUEZ: Hello again, Judge Payne.
10:44:28 Okay. So I'll just first point out that this --

10:44:33 what you just heard, the example that was given on the two
10:44:37 slides that Mr. Fenster put up, is the first time we've
10:44:39 ever seen an example of testimony that Headwater is trying
10:44:44 to exclude under this MIL.
10:44:45 We asked them in the meet and confer process to
10:44:49 identify what they thought was testimony specific to other
10:44:53 patents, and they didn't do so. They didn't do so in their
10:44:57 brief either.
10:44:58 So I'll -- I'll deal with the example that
10:45:01 Mr. Fenster just raised, and I think it shows exactly why
10:45:06 the MIL is not appropriate.
10:45:08 It is common, as Your Honor knows, when
10:45:11 questioning a fact witness about matters that are pertinent
10:45:16 to claim language, you don't necessarily use and frequently
10:45:19 don't use the exact language of the claim. To the extent
10:45:23 that we were, for instance, to ask a question using claim
10:45:26 language that doesn't precisely match, it would, of course,
10:45:30 be within Headwater's prerogative to point that out, to ask
10:45:35 questions about the differences.
10:45:37 But the idea that we are wholesale excluding, and
10:45:42 it's pretty vague, anything that's about other patents and
10:45:46 then Headwater gets to decide whether particular language
10:45:49 is about other patents, I think, is really unworkable.
10:45:52 So not only is the example that Mr. Fenster gave,
10:45:56 I think, an example of testimony that should not be

excluded and that is fair, the Defendants can ask about, but the MIL itself is so broad and amorphous, and they've not given any other examples, that it really hamstrings Defendants from being able to ask fair questions about identical subject matter or highly relevant overlapping subject matter without fear of intruding upon this MIL that they've requested.

THE COURT: What would be your analysis of the example that was just shown?

MS. DOMINGUEZ: So, Your Honor, I know we have an entire brief on the '613 patent and why we think, in fact, those issues are dispositive. So I don't want to preempt that issue, but we've -- we've spilled a lot of ink on this already. This would be an example of where we have our argument that the limitations are actually substantively identical. We set that out. They have their argument as to why they believe there is a material difference between the two limitations.

But asking a question -- again, it's Defendants' prerogative to ask the question. If the witness can be impeached with prior inconsistent testimony, then Defendants should be able to do that. That's the standard rules.

If Headwater wants to point out that it wasn't really inconsistent or that there's some difference that

10:47:25 makes it not inconsistent, Headwater can do that.

10:47:28 But what the MIL is asking is really a broad

10:47:32 sweeping limitation that would hamstring Defendants from

10:47:37 doing a full cross-examination of the same witnesses with

10:47:41 their own inconsistent testimony in the prior proceeding.

10:47:45 THE COURT: So what you're contemplating is that

10:47:55 if the Plaintiffs feel that the question is really directed

10:48:01 to a limitation in a patent that's not asserted here, they

10:48:06 would just have to make that objection in front of the

10:48:10 jury?

10:48:12 MS. DOMINGUEZ: Yes, Your Honor. I think it's

10:48:14 entirely appropriate. If we ask a question and they think

10:48:17 it's not a proper question, they can object to the

10:48:19 question. But the MIL is really unworkable and overbroad

10:48:23 as it's stated.

10:48:24 THE COURT: I think the point I'm hearing from

10:48:27 them is the concern that it would be prejudicial or

10:48:32 confusing to have to take the position that the witness was

10:48:39 addressing a different patent and, therefore, likely in a

10:48:44 different case.

10:48:46 MS. DOMINGUEZ: I don't think, Your Honor, that

10:48:48 that is something we would need to get into. We certainly

10:48:51 wouldn't bring up an another proceeding. And our questions

10:48:55 would be targeted to the relevant subject matter that is

10:48:57 identical here. We're under a -- as Your Honor said this

morning, presumptively an 11-hour time limit. So we certainly don't want to waste our time talking about patents that aren't in the case or issues that aren't in the case.

But where a witness has testified about something directly pertinent to the issues here, we certainly want to be able to impeach that witness with their prior inconsistent testimony.

THE COURT: But you would agree that the -- neither side should mention in front of the jury that there is -- or there has been previous litigation asserting different patents?

MS. DOMINGUEZ: Absolutely, Your Honor. Neither side should be getting into that at all.

THE COURT: Uh-huh. What I'm tempted to do is to carve out something that says that the parties are not to reference patents that aren't asserted here or testimony about those. And obviously, to the extent that you think your question is directed to the description of the accused products and the function of the accused products as opposed to the patent that was asserted in that action, then that would be -- you'd be on the right side of that line.

What's the downside of the Court granting this MIL to the extent of prohibiting testimony that is directed

10:50:58 specifically to patents that aren't asserted in this case?
10:51:02 MS. DOMINGUEZ: I would just do a small tweak on
10:51:04 that, Your Honor, because I think as long as it's -- that
10:51:09 we would not ask questions directed to patents asserted in
10:51:12 another case, the only reason I'm flagging for Your Honor
10:51:16 is there are some prior art patents, there are -- there's
10:51:18 going to be an exhibit dispute about a Verizon patent
10:51:22 relevant to damages. So there may be discussion of other
10:51:27 patents that could be captured in what you just said, but
10:51:31 certainly as to other asserted patents.
10:51:32 THE COURT: So that -- what you're wanting to make
10:51:35 sure we carve out is prior art?
10:51:39 MS. DOMINGUEZ: I'm sorry, Your Honor?
10:51:40 THE COURT: You're wanting to make sure we carve
10:51:41 out prior art patents?
10:51:44 MS. DOMINGUEZ: There are also at least one or two
10:51:47 patents relating to damages issues that are being disputed,
10:51:49 and so I just wanted to clarify that the MIL was not going
10:51:55 to other patents that relate to those other prior art or
10:52:00 damages issues.
10:52:01 THE COURT: Would any of those that you're
10:52:04 concerned about be patents previously asserted by the
10:52:11 Plaintiff?
10:52:12 MS. DOMINGUEZ: No, Your Honor.
10:52:14 THE COURT: So if I frame it that way, it would

10:52:16 capture what I want but not what you're concerned about.
10:52:24 All right.
10:52:26 MS. DOMINGUEZ: Your Honor, just one other
10:52:30 clarification. It would need to be clear that as long as
10:52:32 something is relevant to these patents, it comes in. It
10:52:36 could be relevant to another patent. And so maybe we need
10:52:41 to see the exact language, but certainly we would not be
10:52:44 asking questions specifically raising -- actually
10:52:49 discussing a patent that was asserted in another
10:52:51 litigation. But any questions that are about subject
10:52:54 matter that is relevant to these patents asserted in this
10:52:57 case, it may also be relevant to another patent. We would
10:53:01 want to be clear that anything that is relevant to these
10:53:04 patents asserted in this case comes in.
10:53:07 THE COURT: All right. Thank you, Ms. Dominguez.
10:53:12 Mr. Fenster?
10:53:15 MR. FENSTER: Your Honor, we would be -- we would
10:53:24 welcome Your Honor's articulated ruling. The caveat or the
10:53:30 carve-out that Ms. Dominguez just articulated I think would
10:53:35 gut the entire thing.
10:53:36 So, for example, this testimony -- can you pull up
10:53:44 the first -- the second slide? Yeah, this is fine.
10:53:46 So this was the testimony by Mr. Lavine that I
10:53:52 referenced. It's specifically addressing device display
10:53:56 foreground. They may argue that it's relevant because they

10:53:58 have the view that it's relevant, but this was clearly
10:54:06 being directed to a different patent.
10:54:11 And so we would request that the Court grant the
10:54:15 MIL to the extent that it would prohibit testimony that was
10:54:22 directed to patents that are not asserted here by the
10:54:25 Plaintiff. And that would include, for example, this
10:54:31 specific testimony by Mr. Lavine where he was asked
10:54:34 specifically about the patent -- this is not about a
10:54:39 product but the inventor testifying about the scope of a
10:54:42 patent and a particular patent limitation that is not at
10:54:45 issue here.
10:54:47 THE COURT: All right.
10:54:49 MR. FENSTER: Thank you, Your Honor.
10:54:51 THE COURT: Thank you.
10:54:52 I'm going to grant it, and I will try to be as
10:55:03 clear as possible in the written order about exactly what
10:55:06 it's directed to, but it will be something along the lines
10:55:09 of testimony or argument expressly directed to claim
10:55:21 limitations that are not asserted.
10:55:25 And I'll also mention in the order that it is not
10:55:35 designed to reach references to prior art. And I think
10:55:49 that the Court will be able to apply it appropriately.
10:55:52 But anyway, I'll take into account the arguments
10:55:54 made.
10:55:54 MS. DOMINGUEZ: Judge Payne --

10:55:56 THE COURT: Yes.

10:55:57 MS. DOMINGUEZ: -- if I could, I just want to address, though, the particular question and answer that Mr. Fenster raised and whether that would fall inside or outside the scope of Your Honor's order because that question is actually very pertinent to the patents in this case.

10:56:16 So it's a question of one of the inventors of the asserted patents in this case about language in a patent that shares the same specification. These are both continuations of the same application. They have the same specification.

10:56:33 So whether the inventor believes there's a distinction between a determination as to whether an application is running in the foreground versus whether it's interacting, and I understand it says device display foreground, that "display" word is a different word, but it's an extremely pertinent -- his answer that there's a big difference bears on some of the most central issues for the '613 patent.

10:57:00 So I just wanted to be clear, like, this would be the type of question that should be fair game.

10:57:09 THE COURT: Obviously, if you can ask the inventor a question that is just getting to what the inventor's knowledge or understanding is, that's one thing. But if

10:57:22 you're wanting to impeach him with testimony that was
10:57:27 expressly directed to a limitation that's not in this case,
10:57:32 that's the problem.
10:57:34 MS. DOMINGUEZ: Your Honor, I would point out that
10:57:35 this would be an example of testimony where it would be
10:57:41 something we would want to use directly. We've designated
10:57:46 the testimony. This particular inventor wouldn't be
10:57:51 coming. So it wouldn't an impeachment issue. It would be
10:57:54 an issue of playing the testimony or reading in the
10:57:56 testimony, and Headwater could make its arguments about
10:57:59 whether there was an important distinction in the question
10:58:01 and answer.
10:58:02 THE COURT: And certainly so can you. I
10:58:04 understand that, but I'm not concerned about the effect of
10:58:10 the motion in limine on depositions where you'll be able to
10:58:13 argue these things out of the presence of the jury
10:58:18 beforehand.
10:58:19 The concern is with the live testimony, and the
10:58:22 function of the MIL is to try and shift this discussion to
10:58:28 something at the bench as opposed to in front of the jury.
10:58:35 MS. DOMINGUEZ: Okay. Thank you, Your Honor.
10:58:36 THE COURT: Thank you, Ms. Dominguez.
10:58:38 I'll try and take into account your arguments.
10:58:57 Let's go to MIL 4.
10:58:58 MR. HOFFMAN: Your Honor, the parties' agreement

10:59:01 to -- that both will not address Verizon's investments or
10:59:05 offers to invest in the Verizon case resolves MIL 4 as just
10:59:11 to the Verizon case.
10:59:12 The parties are still discussing a potential
10:59:17 agreement as to the T-Mobile case. And --
10:59:22 THE COURT: So should I interpret that to mean
10:59:25 that MIL 4 is agreed in the Verizon case?
10:59:30 MR. HOFFMAN: Yes. There's specific language the
10:59:31 parties have agreed to that we can submit to the Court.
10:59:36 But, yes, essentially it is agreed.
10:59:39 THE COURT: When are you going to submit that
10:59:44 language?
10:59:44 MR. HOFFMAN: I think we can take a look at it and
10:59:47 this afternoon?
10:59:48 MR. ROSENTHAL: Yes, Your Honor, that's fine. I
10:59:49 just wanted to be clear. It's language that the parties
10:59:52 have agreed. We'll submit it to the Court.
10:59:55 THE COURT: Okay. I'll expect to get back to that
10:59:57 this afternoon then.
11:00:04 MR. HOFFMAN: And as to T-Mobile, because the
11:00:06 parties are discussing a potential resolution, we would
11:00:08 suggest not addressing that today unless they -- not
11:00:14 addressing it until the parties have a chance to try to
11:00:19 resolve it.
11:00:20 THE COURT: All right. And we will address

11:00:23 T-Mobile as soon as we finish with Verizon. Thank you.

11:00:29 MR. HOFFMAN: Thank you.

11:00:29 THE COURT: So that takes us to No. 5, which appears to be tied up, if I'm understanding it correctly, with the motion that we heard yesterday.

11:00:43 Is there any reason that the resolution of yesterday's motion won't also resolve MIL 5?

11:00:51 MR. WANG: Yes, Your Honor. So under MIL 5, the Court should exclude evidence or argument with the jury regarding alleged spoliation or document destruction by Headwater or ItsOn.

11:01:06 And with Your Honor's question and comment in mind, I just want to discuss specifically three reasons why the Court should grant this relief now, and it doesn't depend on -- it doesn't hinge on the arguments we heard yesterday.

11:01:23 THE COURT: All right.

11:01:28 MR. WANG: Okay, Your Honor. So it's a clear 402/403 issue where we saw two thick binders of argument papers yesterday regarding alleged spoliation document destruction. And the probative value to the claims and defenses of this patent infringement case are near zero. Whereas, there's a very high substantial risk of unfair prejudice, confusing the jury, and wasting what's currently 11 hours of trial time per side.

11:02:04 And --

11:02:07 THE COURT: Mr. Wang, let me interrupt you and see. As I recall the Defendants' motion, they're not asking for relief that would involve instructing the jury about this issue. They're asking for relief that would take items away from the jury. So maybe there is not a situation where the resolution of their motion would leave it as a jury issue, in which case your MIL would seem appropriate, but...

11:02:47 MR. WANG: Exactly, Your Honor. That was going to be my second point. They have not asked for any kind of that relief. So we have a live ripe issue here. In none of their papers on that motion do they ask for, you know, allowance to introduce this with the jury.

11:03:03 THE COURT: All right.

11:03:06 MR. WANG: Mr. Krevitt didn't say anything about that yesterday.

11:03:09 THE COURT: Thank you, Mr. Wang.

11:03:10 Let me hear -- if the Defendant has argument of a scenario under which this would be an issue for the jury, tell me about it.

11:03:21 MR. KREVITT: Thank you, Your Honor.

11:03:22 Your Honor obviously heard extensive argument yesterday and is aware of the relief that we're seeking in connection with the sanctions motions and why, given the

11:03:31 prejudice.

11:03:32 If Your Honor were to grant that motion, that
11:03:36 would -- which is why we said in our opposition here that
11:03:39 this is premature. If Your Honor were to agree with us
11:03:43 that a sanction is appropriate and were to agree with the
11:03:48 relief we have requested, for example, if ItsOn weren't
11:03:51 discussed in the case, we have no interest in coming to
11:03:54 trial and talking about the destruction of evidence.

11:04:00 If, though, the issues that were discussed
11:04:03 yesterday with Your Honor, any of those remain in the case,
11:04:06 then for all the reasons I explained as to why our ability
11:04:09 to defend ourselves has been severely hampered, we would
11:04:15 be -- it would be appropriate, and the cases, including
11:04:19 cases from Your Honor say it's appropriate, for us to talk
11:04:21 to the jury to explain to the jury that the material no
11:04:25 longer exists, that efforts to preserve it weren't taken.

11:04:30 THE COURT: You know, that's where I disagree with
11:04:32 you. I believe that you're right that you are entitled to
11:04:37 discuss with the jury whether or not there has been
11:04:40 spoliation, that certain records are not in existence or
11:04:46 not available, that you don't have them. But the fact that
11:04:54 efforts to preserve were not taken appropriately in your
11:05:00 opinion is not something that is necessary or appropriate
11:05:08 to tell the jury.

11:05:10 MR. KREVITT: Well, I'm hoping that's a question,

11:05:13 Your Honor, as opposed to a ruling.

11:05:14 And I have authority from Judge Payne that is to
11:05:21 the contrary. In the Aldridge case, for example, evidence
11:05:25 that should have been preserved and wasn't was allowed
11:05:31 before the jury.

11:05:32 In the Rembrandt case, the existence and the
11:05:35 maintenance and the preservation of information was allowed
11:05:38 to be discussed with the jury.

11:05:39 The Fifth Circuit has found that the issues of the
11:05:41 preservation and the maintenance and the production of
11:05:46 information is germane when Headwater could have preserved
11:05:51 this information. And I promise, I'm not arguing the
11:05:54 merits of that motion.

11:05:55 But when that could have been preserved and wasn't
11:05:58 preserved and now we're in a situation, if they were
11:06:01 permitted, pending Your Honor's resolution of the sanctions
11:06:04 motion, to make arguments about what ItsOn did and what
11:06:07 ItsOn didn't do and what Verizon knew and what Verizon
11:06:10 didn't know, it is, in our view, highly germane for the
11:06:13 jury to be aware not only that documents don't exist, that
11:06:18 were they to exist, we might be able to respond, but why
11:06:23 they don't exist.

11:06:24 To be clear, Your Honor, some of this may be
11:06:27 fine-tuning and parsing language. We don't intend to use
11:06:31 the verb "destroy" or the word "destruction." Spoliation

11:06:37 is not a word that we need to use. We would -- what we
11:06:41 would want -- and, again, we hope none of this becomes
11:06:44 necessary in light of the sanctions motion, but were it to
11:06:47 be necessary, we would want to be able to explain to the
11:06:51 jury why we don't have the information that might be highly
11:06:56 relevant here.
11:06:57 THE COURT: If the Court decides that a party has
11:06:59 not violated a duty of preservation, why should you be
11:07:05 allowed to argue to the jury that the party has?
11:07:11 MR. KREVITT: If the Court finds that there has
11:07:15 been no violation under Rule 37, then why should we be in a
11:07:23 position? Because in that case, Your Honor, your -- the
11:07:26 Court would have found simply that there could be any
11:07:30 manner of reasons as to how the Court were to get there,
11:07:33 for example -- well, Your Honor understands the different
11:07:36 factors that go into that -- any manner of reason the Court
11:07:40 could find that, including whether certain steps were
11:07:43 reasonable or not reasonable.
11:07:44 We would not be arguing any of that to the jury.
11:07:46 We wouldn't be arguing reasonableness, not reasonableness.
11:07:51 We would be saying to them -- rather to the jury the facts
11:07:53 that existed, that there was an ability to preserve these
11:07:58 documents. There was an ability to maintain these
11:08:02 documents and that wasn't --
11:08:03 THE COURT: What does it matter that there was an

11:08:06 ability to do it if the Court has decided that they were
11:08:08 not required to do it?
11:08:08 MR. KREVITT: Because the absence of evidence,
11:08:10 Your Honor, without explanation can very well and likely
11:08:14 would be used against Defendants unfairly. It's a double
11:08:14 prejudice, Your Honor.
11:08:18 We don't have the information to defend ourselves,
11:08:22 and we don't have the ability to tell the jury why we don't
11:08:25 have the information to defend ourselves.
11:08:27 THE COURT: Sure, you do. You don't have that
11:08:30 information because it's not been provided to you. But
11:08:36 what you want to do is go beyond that and say, and the
11:08:38 reason it wasn't provided to us is because the other side
11:08:43 lost it, destroyed it, negligently let it go.
11:08:47 MR. KREVITT: Well, again, maybe it's a question
11:08:49 of parsing, Your Honor. We are comfortable not saying
11:08:53 "destroying." We're comfortable not saying "negligently
11:08:56 let it go." We would -- and this is, again, not -- I know
11:09:03 I was cute earlier or pretended to be with referring to
11:09:06 Your Honor's authority, but this is done and has been in
11:09:09 many cases, including out of this court, in which -- and,
11:09:15 in fact, instructions have been given even when they
11:09:18 haven't been requested in connection with the Rule 37
11:09:19 motion that when we are at trial and Headwater is putting
11:09:24 on evidence that relates to ItsOn, should we get there,

should they be permitted to do so in light of the circumstance that we find ourselves in, we would want to be able and believe under the case law we should be entitled to, explain where the documents were that no longer exist, why they no longer exist, not because anybody intentionally destroyed them or negligently destroyed them, but instead because -- well, just the factual recitation as to what happened as to whether the documents were preserved, whether the documents were not preserved, whether the -- when and why the documents are no longer accessible to us.

Again, Your Honor, we would not be looking to end run -- this presumes a denial of at least some of the relief we requested, and we wouldn't be looking to end run that ruling.

But as the prior cases, as I mentioned, the Rembrandt, the Aldridge, the ZiiLabs case all find it is -- that last was -- was a case also from Your Honor in which spoliation was not explicitly found and yet the Court allowed a party -- and I confess, I don't remember if it's the Plaintiff or the Defendant, but the aggrieved party, if you will, to explain to the jury or to elicit testimony regarding the maintenance, the preservation, the production of relevant information, so the jury isn't left with the false impression that we just didn't get the information or maybe it's reasonable that the information isn't there.

11:10:56 And it's -- it may just be coincidental that the
11:10:59 only information that is there happens to support the
11:11:02 propositions that are being offered by Headwater.
11:11:04 That's why I call that a double prejudice, Your
11:11:07 Honor, and that's why the cases even when not giving an
11:11:10 instruction, even when not giving a remedy have still
11:11:13 allowed the introduction of argument and evidence regarding
11:11:15 the preservation and production of documents.
11:11:22 THE COURT: All right. Thank you --
11:11:24 MR. KREVITT: Thank you, Your Honor.
11:11:25 THE COURT: -- Mr. Krevitt.
11:11:30 And, Mr. Wang, I'm going to carry this one. I
11:11:37 expect to be ruling on the motion that was heard yesterday,
11:11:43 and that will inform the ruling on this Motion in Limine
11:11:49 No. 5.
11:11:52 MR. WANG: Your Honor, we respect that. Could I
11:11:55 have maybe 30 seconds to make three quick points?
11:11:58 THE COURT: All right. I'll give you 30 seconds.
11:12:00 MR. WANG: Thank you.
11:12:00 One, we agree with Your Honor's comments. The
11:12:02 concerns, they're very apparent. We're talking about
11:12:05 frolics and detours that are substantially unfairly
11:12:08 prejudicial.
11:12:09 The cases that Mr. Krevitt mentioned are nothing
11:12:12 like the case here. It's not relief that they've asked,

but they all involve intentional deletion or destruction of discovery in a party's control while a case is pending. And to analogize that here -- here is not appropriate.

The last thing I would say, Your Honor, is I would just respectfully submit that although Mr. Krevitt agreed not to mention destruction, on this issue respectfully, Defendants have somewhat unclean hands where they've accused us of doing destruction, spoliation.

THE COURT: All right.

MR. WANG: It's a very thin line that we don't want to go down.

THE COURT: Thank you, Mr. Wang.

Let's move on to the Defendants' motions.

MR. ROSENTHAL: Good morning, Your Honor. Brian Rosenthal on behalf of Defendants.

So with respect to our first MIL, this is a motion to exclude any reference, whether testimony, argument, fact witness, expert testimony, that the ItsOn product practiced any of the three asserted claims -- of the three asserted patents, I should say.

Couple easy parts of this. With respect to the '613 patent, this doesn't seem to be an issue. It now appears that Headwater's position is that they don't practice, and so I think everyone's agreed that they will not be saying that they practice the '613.

11:13:49 With respect to the '042 patent, I believe that is
11:13:52 also easy. I took the deposition of the expert,
11:13:57 Mr. Cooklev -- Dr. Cooklev with respect to the '042, and
11:14:02 I'm happy to show the testimony, but he said unambiguously:
11:14:02 I have no opinion whatsoever as to whether the ItsOn
11:14:05 product practices the '042.
11:14:07 And in making our arguments with respect to this
11:14:12 motion in limine, there was no attempt in the briefing to
11:14:14 show any evidence, argument, or anything else in the record
11:14:18 that would support the idea that they practice the '042.
11:14:21 So I believe that those two issues are very simple.
11:14:25 I believe that the issue with respect to the
11:14:27 remaining patent, the '541, is equally simple. There is
11:14:33 zero evidence in this case that is competent evidence that
11:14:38 the ItsOn product practiced the asserted claims of the
11:14:42 '541.
11:14:43 Now, we've had a lot of briefing on this, and at
11:14:46 every turn, the Plaintiff has said that's wrong. There
11:14:49 actually is evidence of that. And then they cite to a
11:14:52 bunch of stuff. They don't quote it. They cite to a bunch
11:14:54 of stuff. And when you actually look at what the evidence
11:14:59 is, no expert in this case has ever examined the ItsOn
11:15:04 product, even the hundred thousand pages of technical
11:15:07 documents that they alleged yesterday for the first time
11:15:09 exists about the ItsOn product. No expert has looked at

those documents and concluded, based on those documents, I think that the '541 patent is practiced, let alone said I think that Claims 79 and 83 of that patent are practiced.

This is a critical issue, and this is why we made it our first motion in limine, because this is the trojan horse that Headwater is using to bring in a whole host of irrelevant stuff, copying and willfulness and notice and all kinds of stuff, based on the notion that when activities occur with respect to the ItsOn product, that somehow that bears on these patents.

That entire line of argument is dependent on a premise for which there is zero evidence in this case, and that is that the two asserted claims of the '541 patent are practiced.

So what have they actually pointed to? The first thing they point to is they point to their experts.

Now, I heard Your Honor say, as I've heard Judge Gilstrap and you say many, many times, in this court, experts are limited to the four corners of what they wrote down in their expert reports.

I have in my hand excerpts of their two experts on the '541 patent, Mr. de la Iglesia and Mr. -- I'm sorry, Dr. de la Iglesia and Dr. Wesel. These are all of the paragraphs that they cite to in their briefs, and I've studied them carefully. I have them on a slide if

11:16:44 Your Honor would like to walk through each one of them,
11:16:47 but -- and I'll hand these up to the Court, with the
11:16:51 Court's permission now.
11:16:54 THE COURT: If you could also provide a copy to
11:16:55 Plaintiff's counsel.
11:16:56 MR. ROSENTHAL: Yes, Your Honor.
11:17:07 Here's Dr. Wesel. Here's Dr. de la Iglesia.
11:17:14 MR. MIRZAIE: Thank you.
11:17:14 MR. ROSENTHAL: You got it?
11:17:15 And here are copies of those for the Court -- I'm
11:17:19 sorry, Mr. de la Iglesia.
11:17:27 So there are multiple copies of each, but there's
11:17:30 a -- within the paperclip, you'll find copies of Dr. Wesel
11:17:35 and you'll find copies of Mr. de la Iglesia.
11:17:45 And we can bring that up on the slide.
11:17:48 There should be three copies of each of them.
11:18:10 Hopefully I did that right.
11:18:11 So if I could have the -- you have two?
11:18:16 COURTROOM DEPUTY: Two witnesses.
11:18:17 MR. ROSENTHAL: Two witnesses, that's right.
11:18:19 So, Your Honor, if we could start, I'll show on
11:18:22 the ELMO exactly what was said in those paragraphs.
11:18:23 If we could start, please, with Dr. Wesel.
11:18:34 So the paragraphs that they pointed to of
11:18:40 Dr. Wesel that they say show that Dr. Wesel actually did

11:18:42 this analysis and should be permitted to testify about this
11:18:46 begin at Paragraph 84.
11:18:48 Paragraph 84 has no analysis. Paragraph 84 simply
11:18:51 says that there was a marking page. And then it goes
11:18:55 through with many bullets showing evidence of that marking
11:18:58 page where he says that the '541 patent was present on the
11:19:02 marking page and that the '613 patent was not. That's what
11:19:07 that entire paragraphs says. It has no analysis whatsoever
11:19:11 of how the ItsOn product worked.
11:19:14 Even to the extent that the '541 patent appeared
11:19:17 on the marking page, we have evidence in the record from
11:19:21 Krista Jacobsen, who was in charge of that marking page,
11:19:25 who was the 30(b)(6) witness who testified that all that
11:19:28 they determined in order to see whether or not a product
11:19:31 goes up on that marking page or a patent goes up on that
11:19:34 marking page is if one or more claims of that patent are
11:19:40 met.
11:19:41 And in this case, Claim 1 of the '541 patent,
11:19:44 which would be the most natural one for people to look at,
11:19:49 has been disclaimed.
11:19:49 The only question in this case is about Claim 79
11:19:53 and 83. The fact that the product and the patent appear on
11:19:57 a marking page have nothing to do with whether those two
11:19:57 claims are met by the product.
11:20:04 And in any event, Dr. Wesel does none of that

11:20:07 analysis. He simply says: The ItsOn software included
11:20:10 links. And he goes through and explains what all that --
11:20:12 that evidence that supports it shows. That's what all
11:20:14 these bullets on the next page are, just more evidence
11:20:18 about the marking page. So there's no analysis there.
11:20:21 The next paragraph is Paragraph 85, which simply
11:20:27 says, see also a bunch of stuff in my appendices. There's
11:20:32 nothing in those appendices that says anything -- and I'll
11:20:35 represent to you, that says anything about whether the
11:20:38 ItsOn product meets those claims.
11:20:41 The next paragraph is the only paragraph that has
11:20:43 any relevance to this issue, and it simply says: I
11:20:49 understand -- not opine, not believe, understand -- I
11:20:54 understand that ItsOn practiced the '541 but not the '613.
11:20:58 He never even says that it practiced Claim 79 and
11:21:02 83. He says, I understand -- not believe, analyzed,
11:21:07 opined, and he doesn't even address the two claims at
11:21:09 issue.
11:21:10 The remaining paragraphs that they cite, 87
11:21:13 through 91, I believe, all of those have only to do with
11:21:18 the '613 patent and his explanation as to why the '613
11:21:22 patent is not practiced.
11:21:23 So Headwater repeatedly says in their briefing
11:21:28 that Dr. Wesel did do an analysis and that he did opine and
11:21:32 did conclude that Claim 79 and 83 are practiced by the

11:21:36 ItsOn product. That is absolutely incorrect. He did not
11:21:39 do that analysis. That is not in his report.
11:21:42 The only paragraph that comes close is 86, and
11:21:48 there he doesn't say anything other than he has an
11:21:51 understanding. So that's Dr. Wesel.
11:21:54 Mr. de la Iglesia is worse. For Mr. de la
11:22:01 Iglesia, they identified several paragraphs of Mr. de la
11:22:06 Iglesia's report. And in none of those paragraphs does he
11:22:10 do any analysis whatsoever of the asserted claims and
11:22:14 compare it to the ItsOn product.
11:22:17 Instead, he says -- and I'm showing Paragraph 430,
11:22:21 and I've highlighted the sentence -- the only sentence that
11:22:23 has any relevance here. It says: I understand from
11:22:27 Dr. Wesel's report -- that's the paragraph we just saw --
11:22:30 that the ItsOn software offered these benefits similar to
11:22:36 those offered by the accused features. And then in
11:22:39 parentheses, he says: Because they -- presumably the
11:22:42 accused features -- practice the asserted claims. That's
11:22:46 as close as he comes.
11:22:47 There's nothing else in the entirety of this
11:22:50 paragraph, Paragraph 430, that does any analysis of the
11:22:55 ItsOn software in comparing it to the asserted claims.
11:22:57 They've also cited -- I've highlighted Paragraph
11:23:06 454. 454 is nearly identical to 430, and it has the very
11:23:13 same sentence. The ItsOn software offers these benefits

11:23:16 that are similar to the accused products because
11:23:19 the accused -- because those accused products practice the
11:23:21 asserted claims.
11:23:23 And they also identified Paragraph 463, which has
11:23:29 the same sentence and the same general content.
11:23:32 Those are the only three paragraphs of Mr. de la
11:23:36 Iglesia's report that they point to.
11:23:39 Now, they also point to stuff in his deposition,
11:23:42 which is -- is hand-wavy, at best, but in any event, that's
11:23:48 not the rule in this court. The rule in this court is
11:23:53 you're limited to the opinions that you provided in your
11:23:56 reports. And there is no opinion by either expert that the
11:23:58 two asserted claims of the '541, in fact, are practiced by
11:24:01 ItsOn. Nobody's ever made that analysis.
11:24:04 Mr. Krevitt argued yesterday that nobody could
11:24:07 have done so because the material to do so doesn't exist.
11:24:10 But even -- I mean, you heard Headwater get up and say, oh,
11:24:13 there's lots of documents from which you could have made
11:24:15 that assessment. There's lots of documents -- technical
11:24:18 documents that we produced from which you could have made
11:24:20 that assessment, and they pointed to all kinds of stuff
11:24:23 that they say exist in the record.
11:24:25 But their experts never looked at any of that and
11:24:28 concluded based on that, ah, here's where the elements of
11:24:33 Claim 79 and 83 are.

11:24:36 And so what we have is a whole house of cards of
11:24:39 copying and willfulness and all kinds of other stuff that
11:24:42 is resting on a premise, a necessary legal premise for the
11:24:46 relevance of that information, which is that the product
11:24:49 practiced the two claims that are at issue in this case for
11:24:53 which there is zero evidence.
11:24:54 The only other two things that they point to as
11:24:58 alleged evidence of that fact, other than those
11:25:04 non-existent opinions of their experts, are they say, A,
11:25:08 Dr. Raleigh said he thinks that they practice. Well,
11:25:10 that's a lay witness who has not provided any expert report
11:25:14 in this case. We wouldn't even be permitted to ask him
11:25:17 that question in this court, let alone have them rely on
11:25:21 that naked lay opinion about claims for which there is a
11:25:26 legal question about whether or not they're practiced.
11:25:29 In fact, Dr. Raleigh -- and we pointed to this
11:25:32 testimony in our briefing. Dr. Raleigh, when we were
11:25:36 asking, why didn't you sue us for 10 years? Why didn't you
11:25:39 write us a letter for 10 years? He said: There's no way I
11:25:43 could have because you need an expert to see whether you
11:25:45 infringe. You require expert testimony, and we didn't have
11:25:48 access to an expert for 10 years. It was too expensive.
11:25:50 That was his story.
11:25:53 Now Headwater wants to be able to introduce
11:25:56 Dr. Raleigh to say: Don't worry about it, trust me --

11:25:59 literally he said trust me -- I did the analysis, and you
11:26:03 infringe -- or, sorry, the ItsOn product meets the claims.
11:26:06 So that is really inappropriate. It's
11:26:10 inappropriate not only as a general matter to have a lay
11:26:14 witness testify about whether a product meets a claim, it
11:26:19 is particularly inappropriate when that particular witness
11:26:22 has said I cannot even make that assessment without an
11:26:25 expert.
11:26:27 And the last piece of evidence that they point to
11:26:30 is they say, well, we marked. And since we included the
11:26:36 '541 patent on our marking page, we should be allowed to
11:26:38 tell the jury that these claims are practiced by the
11:26:40 product.
11:26:42 That's backward and bootstrapping. I mean, the
11:26:44 fact that they made some decision to put a product and a
11:26:47 patent up on a marking page is not evidence that it, in
11:26:50 fact, meets the claims. It's evidence that someone put
11:26:52 that patent number on the marking page.
11:26:54 But even if you take that -- we actually took the
11:26:58 deposition of Ms. Jacobsen who testified about that marking
11:27:03 page, and we asked her the question directly: Does the
11:27:06 ItsOn product meet any claims of the '541?
11:27:09 And she said: I don't know the answer to that.
11:27:13 All I know is the procedure we went to. And all I know
11:27:16 about the procedure is that we would put a product up there

11:27:19 if one or more claims we believe were met.

11:27:23 So that's the most that that marking page could
11:27:26 possibly do is establish that someone at some point
11:27:30 believed that one or more of the claims are met. The
11:27:33 question in this case is about these two claims.

11:27:38 And so we don't believe that they should be
11:27:43 permitted to put any evidence of this on since there's no
11:27:47 competent evidence that would support it. This is a motion
11:27:50 in limine issue because there's a huge prejudice that comes
11:27:53 with their ability to link -- improperly and without
11:27:55 support through speculation, to link this product to these
11:28:01 two claims of this patent because it brings with it so much
11:28:04 prejudicial evidence.

11:28:06 The other thing that they argue is we can't make
11:28:09 this argument because we are separately arguing that they
11:28:13 haven't met their marking obligations. They say there's an
11:28:16 inconsistency between those two things. That is absolutely
11:28:19 not true. At no point in this case have we ever said that
11:28:23 the '541 patent is practiced by the ItsOn product.

11:28:27 We have a -- we submitted an Arctic Cat letter,
11:28:36 which is Exhibit 14 to our MILs. And in that Arctic Cat
11:28:40 letter on May 24th of 2024, we said only the following.

11:28:46 We said: You, Headwater, have taken the position
11:28:49 that the ItsOn product practices this patent, therefore, we
11:28:53 are notifying you under Arctic Cat that you are now obliged

11:28:58 to demonstrate that you met the marking requisites -- that
11:29:02 you met the marking requirements.
11:29:05 We never said that we agree with that. To this
11:29:07 day, there is not a single piece of paper in this case
11:29:10 where we said we believe that this product practices the
11:29:14 '541, and we do not believe that it does, right?
11:29:18 But they said it did. They continue to say it
11:29:21 does. And, therefore, under the law, they have an
11:29:23 obligation to demonstrate that they've met their marking
11:29:25 obligations.
11:29:25 So there's no inconsistency at all between what
11:29:28 we're arguing now and what we have in our marking paper.
11:29:31 So I believe that's it.
11:29:34 The only other thing I will say is this. They
11:29:37 also say that, well, if -- if this motion is granted, that
11:29:39 that has some impact on whether we can talk about the
11:29:44 failure of the ItsOn products. That's an issue that we're
11:29:47 going to discuss later today. And based on the outcome of
11:29:49 this MIL, they can argue that that has some impact on that.
11:29:52 We don't believe it does. That is not what this MIL is
11:29:57 about.
11:29:57 This MIL is about a very singular issue. Are they
11:30:00 permitted to put on any evidence, argument, or suggestion
11:30:02 that the ItsOn product practices these two claims -- well,
11:30:06 any of the patents, but these two are the only real issue.

11:30:09 THE COURT: All right.

11:30:09 MR. ROSENTHAL: Thank you, Your Honor.

11:30:12 THE COURT: Thank you, Mr. Rosenthal.

11:30:13 We will adjourn until 1:30. And I'll hear from the Plaintiff on this MIL. Thank you.

11:30:20 COURT SECURITY OFFICER: All rise.

11:30:21 (Recess.)

11:30:22 COURT SECURITY OFFICER: All rise.

01:29:00 THE COURT: Thank you. Please be seated.

01:30:44 Mr. Mirzaie, whenever you're ready.

01:30:51 MR. MIRZAIE: Thank you, Your Honor.

01:30:52 And we do have a set of slides, mainly on MIL 1, but I think they also relate to portions of the next MIL, Your Honor, so we'll pass those out.

01:31:12 Can we get the -- I guess the -- thanks. Can I get Slide 1?

01:31:16 Your Honor, the entire basis of Defendants' MIL No. 1, as we just heard, was Headwater has no competent evidence that the patents were practiced by ItsOn. And what was made clear in the briefs and is crystal clear now that -- is that what Defendants mean by that is one thing only, that Headwater has no competent evidence because it should have presented expert opinions detailing a claim mapping between the claims and the ItsOn products for purposes other than infringement, marking, and secondary

01:32:12 indicia.

01:32:13 And the main problem with that for them is that
01:32:17 the case law does not in any way support that argument, and
01:32:21 I'll get into that. And the relevant case law contradicts
01:32:24 it. It's not Headwater's burden to have that kind of claim
01:32:33 mapping or expert evidence at all for marking where they
01:32:37 agree or stipulate that a product by ItsOn uses the patent.
01:32:42 And it's also not Headwater's burden of persuasion at all
01:32:46 with regard to secondary indicia.

01:32:48 Headwater has the burden of production with regard
01:32:53 to a secondary indicia to identify products. And it's
01:32:56 actually the burden of proof and persuasion with regard to
01:33:00 expert testimony or otherwise stays with Defendants on
01:33:04 secondary indicia because it's an issue of validity --
01:33:08 invalidity rather.

01:33:09 And what the cases will show also is that there is
01:33:12 no requirement that expert testimony on those things is
01:33:15 required at all. The main case that Defendants have -- the
01:33:20 only case they cited is the Centricut case. The Centricut
01:33:25 case makes clear that -- and the Defendants concede in
01:33:28 their reply that it's not a per se rule that expert
01:33:32 testimony is needed in every case. It's only needed for
01:33:35 infringement and validity in highly complex cases.

01:33:38 But the bigger point of that case, Your Honor, is
01:33:41 that it's limited to the issues where a claim mapping is

required, and that's infringement and validity. Those do not apply to the issues of marking or secondary indicia, which is I think the real thrust of this MIL.

The Defendants' MIL is not about any infringement opinions. It's about opinions regarding whether ItsOn, a licensed product, practiced it. And for that, there's just no legal requirement at all that there be expert opinions, let alone expert opinions detailing claim mapping.

What the law does demand -- Headwater has met that and exceeded that on every issue covered by Defendants' MIL No. 1. And because expert testimony is not required, we also went above and beyond to cite other types of evidence, and I'll go through a little bit of that now.

So as I detailed, Centricut, that only stands for the proposition that for the issues of infringement and invalidity for complex technical cases only, not every case, there is an expert opinion required on the claim mapping. And we agree with that. That is -- that is -- we followed that in this case. Their MIL is not about claim -- is not about infringement at all.

The issue with their MIL is with regard to not products that infringe but products that are licensed, namely ItsOn, whether ItsOn practiced.

Now, that relates to two issues in the case, marking and secondary considerations.

01:35:22 For marking, the Arctic Cat rule is that
01:35:29 Defendants have a burden of production to identify products
01:35:36 they practice.
01:35:36 They served us with a letter. That letter
01:35:40 identified all the patents as practicing. And they needed
01:35:44 to have a good-faith basis -- that's what's Arctic Cat
01:35:50 requires -- to meet that burden of production. And in this
01:35:54 case, they said that the ItsOn products do practice in the
01:35:58 letters, and they needed a good-faith basis to do so.
01:36:01 And now many months later, they've maintained that
01:36:06 position. And, in fact, filed a motion for summary
01:36:08 judgment that rests on that position, Your Honor. It rests
01:36:11 on the position that Headwater's -- rather -- sorry,
01:36:15 ItsOn's products the patents, and, therefore, there's a
01:36:20 marking obligation triggered.
01:36:22 Now --
01:36:22 THE COURT: Mr. Mirzaie --
01:36:23 MR. MIRZAIE: Yeah.
01:36:24 THE COURT: -- does your client contend that ItsOn
01:36:27 practices any of the asserted patents?
01:36:29 MR. MIRZAIE: Yes, Your Honor.
01:36:31 THE COURT: And what is -- what is the basis for
01:36:36 that contention?
01:36:37 MR. MIRZAIE: Your Honor, the -- Mr. Rosenthal is
01:36:40 correct that my client does not contend that it practices

01:36:44 the '613 patent, but it does contend that it practices the
01:36:50 other two patents. And the basis of that contention is --
01:36:56 there's several pieces of evidence.
01:36:58 The first piece of evidence is the marking page
01:37:02 that ItsOn has had for a very long time. That lists the --
01:37:10 the patents that are practiced by ItsOn. That's been
01:37:12 around for years. The Defendants have had that list.
01:37:14 They've deposed the people that were involved in creating
01:37:17 that list.
01:37:18 Beyond that list, though -- and we submit that
01:37:21 that -- that's enough in terms of the marking issue, and
01:37:26 the reason why -- but there's lot more -- but the reason
01:37:31 why that's enough is that what Arctic Cat tells us is that
01:37:35 where the Plaintiff -- after the Defendant has met their
01:37:38 burden of production, where the Plaintiff disputes that the
01:37:42 licensed product practices it, then that triggers a burden
01:37:47 of proof and persuasion to prove otherwise.
01:37:50 We did that with the '613. That's not the basis
01:37:52 of Defendants' MIL. We provided expert opinions on the
01:37:55 '613 about the limitation that's not met.
01:37:57 Where the Plaintiff concedes and stipulates that a
01:38:01 licensed product is practiced by a particular patent --
01:38:05 then there's just an agreement between the parties. And
01:38:08 the Defendants haven't cited a case that -- at that point
01:38:11 the Defendant -- the Plaintiff has to provide some type of

claim chart.

It's quite the opposite, Your Honor. All the cases that we've been involved in -- all the cases cited, the issue sort of goes off the table. There's no claim charts in those cases. In fact, it's now our burden to show that the marking obligation was satisfied. And so that's the kind of evidence we have to show.

And so here, they had a good-faith basis, or they were supposed to, for the Arctic Cat letter to say that for certain patents, ItsOn did practice those patents. We agreed. We didn't just stop there. There is the marking page.

Beyond the marking page, there's also documents that we've cited and produced to them. It includes documents like the ones that are on Slides 6 through 8, Your Honor.

These are just some examples. These are 2011, 2012, and later requirements -- documents from ItsOn, white papers from ItsOn describing the product that they had.

There's been plenty of depositions on this issue from the inventor, who was also at ItsOn. And what you'll see in those documents and also based on the deposition testimony is that the products -- it wasn't some conclusory testimony or evidence.

In fact, the testimony and evidence from

Dr. Raleigh in the documents ties the products to claim elements.

The '541, for example, it has the control of background traffic. You've heard of those types of claim elements. And what the testimony and the documents show is that it did have that feature -- the ItsOn products had that feature.

This is a Verizon Wireless trial readout dated 2011, based on some testing that the two parties had done.

And you'll see here there was a request that was met for that same type of background service restriction.

Slide 8 is similar in that it describes other parts of the claim elements. So there's plenty of evidence that it is met. And it's not our burden to show that once we've stipulated that an accused -- that a licensed product, rather, does practice a patent.

Once you've done that, there is no burden that Headwater has. Headwater had a burden on the '613 patent to disprove that it used that, and that's not part of Defendants' MIL No. 1 as far as we understand. There's an agreement there, too.

So the other issue that we have -- and, again, the crux of this is there's not a single case on this issue of namely whether -- not infringing products but licensed products practice the patent where a Plaintiff was required

to have expert testimony to prove that up and have to deal with the pre-suit damages defense, Your Honor.

This is an issue that's different from infringement. Centricut does govern the issue of expert testimony and whether it's required in complex -- the most complex of cases on the issue of infringement. It doesn't apply to the issue of licensed products and whether those are practiced. There's no burden of proof or persuasion, but we have the evidence anyway.

THE COURT: And in what context is there an issue about whether a licensed product practices the patent?

MR. MIRZAIE: Your Honor, do you mean which issues in the case?

THE COURT: Well, in marking, it's never going to be the Plaintiff's burden to show that the product practices the patent.

MR. MIRZAIE: Precisely, Your Honor.

THE COURT: You're simply either admitting it or denying it.

MR. MIRZAIE: Exactly, Your Honor.

THE COURT: But what does that have to do with the question we're dealing with here where their motion in limine is saying that you should not be allowed to represent that ItsOn practices the patent if you don't have evidence to support that?

01:42:31 MR. MIRZAIE: Well, I believe that -- the
01:42:33 Defendants don't come out and state it, but what we can
01:42:36 glean from their briefing is that they want to eliminate
01:42:41 background facts and facts that concern secondary indicia,
01:42:47 Your Honor.
01:42:47 For secondary indicia, we have pointed to evidence
01:42:51 about copying. That's the subject of Defendants' MIL No.
01:42:55 2. We've pointed to evidence of long-felt need, Your
01:42:59 Honor. We've pointed to evidence of praise for patented
01:43:02 features. We've pointed to all that evidence, and the key
01:43:06 point there, Your Honor, and I think that's really what
01:43:08 they're trying to get at even though they don't come out
01:43:10 and say it, I think they -- if they believe that if they
01:43:15 win on this motion, then they're going to come back and
01:43:19 say, well, some of our secondary consideration evidence
01:43:22 needs to come out.
01:43:23 I'll let Mr. Rosenthal address that question, but
01:43:26 that was our understanding of sort of the impact of this.
01:43:29 I'd love to hear if that's not true.
01:43:31 And on that question, the only other question we
01:43:36 think that this could be relevant to in terms of an actual
01:43:43 issue on validity, infringement, or damages, the important
01:43:45 point there, Your Honor, is that the burden of production
01:43:47 and persuasion are flipped from Arctic Cat.
01:43:51 And on that issue, what we know from the Federal

01:43:54 Circuit is that for secondary indicia, the burden of
01:43:58 persuasion, because it's an issue of validity, remains with
01:44:01 the challenger. The patentee just bears the burden of
01:44:05 production.
01:44:05 So all the same evidence that we showed goes well
01:44:08 beyond the burden of production, which, again, for both
01:44:11 marking and Defendants' burden of production and secondary
01:44:15 indicia and Headwater's burden of production, it just
01:44:19 requires having a good-faith basis in identifying a
01:44:22 practicing product that's licensed.
01:44:24 And we did that by saying that ItsOn is licensed
01:44:28 for the '541 and the '042, and not the '613. And the
01:44:35 burden of proof and persuasion stays with Defendants. For
01:44:41 their part, they don't have any evidence whatsoever, expert
01:44:43 or otherwise, trying to disprove that the ItsOn products
01:44:49 practice the '541 and the '042. They have no evidence.
01:44:52 And there's a reason why, Your Honor, because they
01:44:54 are taking the position, as you've probably read -- seen
01:45:00 today and read in their MSJ of marking, that the -- for the
01:45:05 '541 and '042, ItsOn did practice. And that's a necessary
01:45:10 argument that they need to make in good faith to trigger
01:45:12 even having -- even having that defense in the first place.
01:45:15 Now, we think that that motion fails for multiple
01:45:19 reasons, but the statement from Mr. Rosenthal that we
01:45:23 heard, I think, today for the first time is an absolute

01:45:28 contradiction to what we've heard so far.

01:45:31 I think he's said that they aren't saying that the
01:45:34 ItsOn products practice the '541 and '042. That's the
01:45:37 first we've heard of it, and I think the record is clear
01:45:39 that from the moment they sent us their Arctic Cat letter,
01:45:43 they were required to and did say that they have a
01:45:45 good-faith basis to believing that the '541 and '042
01:45:50 patents are practiced by ItsOn. And they've maintained
01:45:53 until today in the moment they filed the motion for summary
01:45:57 judgment on pre-suit damages, which rests on that premise.

01:46:01 And so for secondary indicia, we don't have any
01:46:08 burden to show evidence of mapping claim elements, let
01:46:12 alone through expert opinion. And you'll find no case
01:46:16 cited by Defendants stating otherwise.

01:46:21 The ZUP case and plenty others that you see on
01:46:26 Slide 13 clearly shows the opposite. The burden of
01:46:29 persuasion remains with the challenger to disprove it.

01:46:33 We just had a burden of production of identifying
01:46:35 it. We've done that through the rog responses. We've done
01:46:39 that with the marking page. We've done that with
01:46:41 Dr. Raleigh's testimony. We've done that with Krista
01:46:48 Jacobsen's testimony. We've done that by producing and
01:46:51 citing documents about ItsOn's products that actually map
01:46:55 to the claim elements -- that have a nexus to the claim
01:46:59 elements.

01:46:59 Now --

01:46:59 THE COURT: Are you saying that the ZUP case deals with whether a product practices the patent?

01:47:07 MR. MIRZAIE: The ZUP case deals with the burden of -- the burdens on the issue of secondary indicia. And what it does deal with is, you know, whose burden is it on that issue. That's the only other issue besides marking that we're aware of that this can even relate to, Your Honor.

01:47:28 And so on that issue, what this makes clear -- and there's numerous other cases, too, that make clear -- there is no case that suggests that the patentee, in order to have an argument or evidence concerning secondary considerations, that they need to do a claim mapping first. And that, by the way, Your Honor, is regardless of the marking issue.

01:47:52 THE COURT: I didn't hear anybody on the Defense side talk about claim mapping at all. It was just talking about whether there is evidence that the ItsOn product practices the patents.

01:48:07 MR. MIRZAIE: Your Honor, from the briefs, and also I think what we did hear from Mr. Rosenthal's argument today is that you need expert testimony tying the ItsOn product -- we needed that for these issues -- tying the ItsOn product to a patent. And he mentioned that it needs

01:48:29 to tie to the claim elements. He mentioned that -- even as
01:48:33 he stated this morning, Your Honor, that Claim 1 is not
01:48:36 even good enough, which is inconsistent with the law. You
01:48:39 need to tie it to the claim elements of the asserted
01:48:42 claims, and that's just not true.
01:48:43 There is no case that stands for the proposition
01:48:45 that for -- for -- not an infringing product, but a
01:48:51 licensed product, a practicing product that's licensed,
01:48:56 those are the kinds of things that patentees use to try to
01:49:00 prove long-felt need, to try to prove copying, and try to
01:49:04 prove praise and other secondary indicia.
01:49:09 There is no case that stands for the proposition
01:49:12 that for that issue -- for the patentee or the patentee's
01:49:18 licensee's products, you need to do a claim mapping or that
01:49:22 you need to have any kind of expert testimony at all.
01:49:27 Centricut does not stand for that proposition, claim
01:49:31 mapping or otherwise.
01:49:31 And so there's a mere burden of production which
01:49:34 applies to whether there is a practicing product, and it
01:49:39 also applies to the nexus, Your Honor. And this is the
01:49:41 next point I wanted to make.
01:49:44 There is a further requirement of having a nexus,
01:49:47 and that is part of the same requirement, actually, for
01:49:51 secondary indicia. And what the WBIP case on Slide 14
01:49:58 shows is that -- they use the example of commercial

01:50:00 success, but it certainly stands for the broader
01:50:04 proposition of secondary considerations in general. They
01:50:10 may be linked with a nexus to a, quote, individual element.
01:50:10 And we have evidence of that, too, and that's part
01:50:14 of the evidence that I showed earlier. We have evidence
01:50:17 through the documents, through the witness testimony that
01:50:23 the background/foreground limitations, for example, that
01:50:28 were in the ItsOn product literature, that was, you know,
01:50:33 in the -- that was actually in the ItsOn product. And so
01:50:37 what our evidence shows -- and the nexus actually -- there
01:50:42 is also expert testimony on that, Your Honor. Not that
01:50:44 that's required, but we do have expert testimony on the
01:50:46 nexus.
01:50:47 We also have testimony, as we show on this slide,
01:50:53 about -- concerning some of the dealings and communications
01:50:57 between Verizon and ItsOn, about 15 or so years ago, and
01:51:03 this is regarding Mr. Russell. And Defendants have filed
01:51:07 another MIL on related issues on this, but we cite to this
01:51:12 evidence that you see here for, among other things, this
01:51:16 secondary indicia. And we have evidence, including through
01:51:18 expert testimony, about the fact that there's a nexus
01:51:22 there.
01:51:23 What we -- what we don't have -- the only thing we
01:51:27 don't have is expert testimony mapping all the claim
01:51:31 elements or, like, a majority of the claim elements to the

01:51:37 ItsOn products.

01:51:37 I will concede that. We do have some expert
01:51:43 testimony of -- Dr. Wesel, for example, did say that based
01:51:48 on his citations, and Mr. Rosenthal's exhibit that he
01:51:53 handed up showed this, as well -- based on his review of
01:51:56 all this evidence, including the evidence that you see on
01:51:58 the screen, including the evidence concerning some other
01:52:01 ItsOn-related documents and the marking page, that he
01:52:06 understands that it's met, that the products -- ItsOn
01:52:11 products do practice the '541 patent.

01:52:19 And what he doesn't have is something that you
01:52:22 don't need, which is an element-by-element claim mapping,
01:52:28 mapping all the claim elements to the ItsOn product.

01:52:30 THE COURT: You know, I don't have any doubt that
01:52:35 a fact witness like, I guess, Mr. Russell is who you have
01:52:40 on the screen there, can testify as to whether or not a
01:52:45 product has certain features, but to say whether those
01:52:51 features meet the limitations of a patent claim, I think,
01:52:57 is inherently an opinion.

01:52:59 So I'm having trouble understanding how you would
01:53:05 do that without what you're calling expert testimony.
01:53:12 Whether it's an expert or not, it has to be someone who can
01:53:16 provide an opinion.

01:53:17 MR. MIRZAIE: Well, Your Honor, I think the key
01:53:19 point there -- I appreciate the question -- is that what's

not required is an element-by-element claim mapping for ItsOn products by an expert witness for any issue in the case. That may be required for infringement, but not for the ItsOn products.

On nexus, which I showed here on Claim 14, that -- there just has to be some type of linkage to even an individual element, like background/foreground. And I do think that we have plenty evidence of that, including expert opinion.

So we do have nexus. You know, in our expert reports, if -- we're certainly obviously -- we're going to live by Rule 26, and the experts do cite the documents about background/foreground from ItsOn for this very reason.

Dr. Wesel cites the documents, including documents of the kind that I showed on Slides 6 through 8, and he goes through the various ItsOn-related documents to tell the overall story about ItsOn. And he -- after he cites to all the evidence about ItsOn and the background story, including Mr. Russell's place in it, he then says that he understands based on the evidence, including the Defendants' Arctic Cat letter, including, you know, the marking page, including other evidence, that there is products from ItsOn that practice the '541, and that's more than enough for Headwater's obligations for secondary

01:55:08 indicia.

01:55:08 Nexus -- we do have expert testimony on nexus, and
01:55:14 we're certainly going to live by Rule 26. If this MIL is
01:55:18 just about applying Rule 26 to the expert opinions on
01:55:25 ItsOn, then we're certainly going to live by that. We're
01:55:28 not going beyond our expert reports on that.

01:55:30 I think the key issue -- among several, the key
01:55:37 issue is what is required from the experts on whether ItsOn
01:55:40 practices. And the case law suggests that on -- or states
01:55:45 that on secondary indicia, it's just a burden of production
01:55:50 of having a good-faith belief that one does.

01:55:54 We have much more than that, and we have the nexus
01:55:56 in our expert reports.

01:55:58 THE COURT: So you would direct the Court to that
01:56:02 Centricut case and the ZUP case?

01:56:07 MR. MIRZAIE: Yes, Your Honor. Centricut, I
01:56:11 believe, is the key or only case cited by Defendants on
01:56:15 this proposition of expert testimony being required, but
01:56:19 what's clear from Centricut and all the cases that came
01:56:23 before and after it is that that's not talking about
01:56:26 secondary indicia and what the patent owners' burdens are
01:56:32 there. It's not talking about marking, as Your Honor
01:56:36 correctly stated, I think, a few minutes ago.

01:56:39 That's talking about the patentee's burden on
01:56:47 infringement or the Defendants' burden on invalidity of

doing claim mapping in a, quote, complex -- technically complex case.

Now, you could debate whether this is a technically complex case or not, but setting that aside, Centricut just does not apply to any obligation or burden that Headwater has beyond infringement. And on infringement, we certainly have a claim mapping, and Defendants have never stated otherwise in our expert report.

So I would -- I would point to those cases.

I would also point to the WBIP case that makes clear that for nexus -- again, the burden of persuasion on validity rests with Defendant at all times. That's what the Federal Circuit case law says.

But on nexus, it could be linked to just an individual element, and there's no claim mapping required there. But we have expert testimony, and we'll live by that, on that issue.

I don't think that there's a case, Your Honor, that requires that the only kind of evidence that you're allowed to present on nexus is expert testimony. I don't think that you'll find that case.

But we -- you know, we have it in our -- there is evidence cited on that in our expert reports, but the law does not demand that for nexus, you know, there has to be

01:58:10 expert opinions and only expert opinions.

01:58:14 We have opinions citing that nexus, but we also
01:58:18 have plenty of other evidence about the ItsOn products
01:58:22 having, you know, background/foreground restrictions and
01:58:27 other issues.

01:58:27 And the other correction I'll make is that on the
01:58:30 '042 patent, Mr. Rosenthal said that -- I think he said
01:58:33 that we concede that it doesn't practice. But that's
01:58:36 incorrect. We've never conceded that it doesn't practice
01:58:40 in any -- in any place.

01:58:42 But that issue just blends together with the '541
01:58:45 issues. And these are the relevant cases -- and these
01:58:49 cases and their progeny are sort of, you know, the cases
01:58:52 that govern this issue.

01:58:54 And, of course, with the nexus issue, Your Honor,
01:58:57 that's something that case after case -- and I don't think
01:58:59 Defendants argue otherwise -- make clear that that goes to
01:59:03 weight, not admissibility.

01:59:07 So if we had no evidence of nexus, expert or
01:59:12 beyond the expert report, that'd be one thing, but that's
01:59:16 not this case, and that's not what Defendants are arguing,
01:59:19 as far as we understand it. And it's just not consistent
01:59:22 with the record at all. As long as you have some evidence,
01:59:26 then the nexus part, you know, goes to weight, not
01:59:29 admissibility.

01:59:30 And the WARF case that you see here on Slide 17
01:59:40 stands for that proposition, as well. This is WARF v.
01:59:46 Apple at 135 F.Supp.3d at 876 to '77. There's other cases
01:59:55 on this issue, as well.
01:59:56 But -- so I think bottom line is that for issues
02:00:01 beyond infringement, Your Honor, the case law makes clear
02:00:04 that there is no element-by-element claim mapping required.
02:00:09 And Defendants, for their part, have certainly not pointed
02:00:13 to a case that argues that or shows that for opinion -- for
02:00:16 opinion testimony especially. And we've gone well beyond
02:00:20 what we're required to do, both for whatever issues we
02:00:28 can -- whatever issues relate to whether ItsOn practices,
02:00:32 we -- it seems clear to us that the only two issues are
02:00:35 marking, for which we don't have any burden once we concede
02:00:39 it, and for -- the relevant burden there was just to show
02:00:46 that there was sufficient marking or notice.
02:00:48 And then for secondary indicia, we just have a
02:00:51 burden of production of identifying it.
02:00:54 Defendants' burden is for persuasion to show that
02:00:56 there is none, and they have zero expert testimony or
02:00:59 evidence on that. That's not really the basis of this MIL
02:01:01 anyway, which brings me to sort of the final point here,
02:01:05 which is that if you -- we think this is an improper MIL,
02:01:10 too, in general because the MIL is essentially saying that
02:01:18 because there's insufficient evidence from Headwater that

ItsOn products practice, Headwater cannot tell the jury that ItsOn products practice.

And the extension of various arguments that Defendants are making -- I'd love for Mr. Rosenthal to tell me that this is wrong -- is that, therefore, certain secondary indicias can't be shown by Headwater -- maybe it has an impact to other issues, such as maybe willfulness or something, and that's just not -- not the case here. And because of that, we think it's an improper summary judgment seeking to exclude evidence concerning secondary indicia and other things. And that just goes well beyond the scope of what MILs should be.

But the key is that it rests on a legal -- legal requirements that are completely inconsistent with the actual law for practicing products that are licensed and what Headwater's burdens are.

THE COURT: Isn't the whole question that's being presented by their motion whether it is a practicing product?

MR. MIRZAIE: The question that's being presented by their motion is whether we have competent evidence of it being a practicing product.

THE COURT: All right. Do you?

MR. MIRZAIE: We do because Defendants' argument is that the only way to have that is through expert

testimony and mapping, and that is an incorrect premise of law.

And also the Defendants are obviously trying to have it both ways, Your Honor, by telling us and maintaining the position that -- that they believe that the '541 and '042 practice -- are practiced by ItsOn, and then when it comes to -- also at the same time saying that there's no competent evidence that it does so that they can sort of have it both ways.

THE COURT: You know, that is a marking question that certainly we can take up in connection with the motions on that.

If I'm understanding your position properly on this MIL, you're not arguing that you have an opinion from anyone that ItsOn practices either the '042 or the '541, you're saying that you don't need an opinion?

MR. MIRZAIE: Well, to be clear, Your Honor, what we're saying is that you don't -- we don't have an opinion mapping all the claim elements.

THE COURT: I'm not asking about that. You keep bringing up whether something is mapping all the claim elements.

I'm just saying do you have testimony from anyone that you'll be offering that it practices the patent?

MR. MIRZAIE: Yes. We have opinions and other

testimony from non-experts that the ItsOn products do practice, for example, the '541.

THE COURT: And who -- who are those?

MR. MIRZAIE: So Dr. Wesel -- well, I'll start with Dr. Raleigh, the inventor.

Dr. Raleigh, the inventor, he will talk about -- or plans to talk about ItsOn -- the ItsOn products, the technical configurations of the ItsOn products, using documents that we've long-produced about exactly what those products and services entailed.

Then Dr. Raleigh and Krista Jacobsen will have testimony that based on an analysis of all of the product literature and technical ability of the products years ago -- roughly 10-plus years ago, there was a conclusion by ItsOn to add the '541 patent, for example, and the '042 patent, by the way, to the marking page. And we have the marking page that shows that also.

THE COURT: Did Dr. Raleigh in any of his depositions testify that the ItsOn products practiced either the '042 or the '541?

MR. MIRZAIE: I believe he did, Your Honor. I believe he did say that based on the marking page, because those patents were and have been for many, many years on the marking page, what that meant was there was a determination by ItsOn and its lawyers years ago, based on

the product literature -- there was a determination that the ItsOn products did practice, and that's why it's been on the marking page for such a long time. And based on all of that evidence and including Defendants' Arctic Cat letter and other evidence, Dr. Wesel then, for his part, cites that evidence and says that his understanding is that the ItsOn products practice the '541.

THE COURT: Why does he say it's my understanding instead of it's my opinion?

MR. MIRZAIE: I'm not sure, Your Honor, but I also don't think that it matters. It is in his expert report, and what it's preceded by in many, many pages in sections of his report is the same type of evidence that I just discussed, namely, the ItsOn story, the ItsOn technical documents, the marking page, and that -- that's what precedes that one sentence that is quoted in Defendants' brief.

So perhaps he could have been a bit more, you know, artful in his testimony on that issue. But, again, we don't believe that there is expert testimony required for whether licensed products practice.

In any event, he cites the relevant documents and has that opinion anyway based on the fact -- the facts of the case, including product literature and the marking page and what went into it, and all of that is certainly more

than enough for whether -- for Headwater's part as to whether the ItsOn products practice.

THE COURT: All right. Are there -- besides Centricut and ZUP, what -- what other case law do you want the Court to examine in connection with your argument?

MR. MIRZAIE: I think that the other cases are WBIP v. Kohler Co. That's at 829 F.3d 1317. That's a Federal Circuit case from 2016. This is the case that I just showed Your Honor that does talk about the extent to which you -- there's any nexus required is -- can be for a claim element. And for -- for that, we certainly have non-expert and expert testimony. So that's one more case.

And then on nexus and in terms of -- for secondary indicia, whether products practice, which is the only other issue that we could think this matters for, I think Quanergy Systems, which is at 24 F.4th 1406. And this is at 1417 specifically for a pincite. It's a Federal Circuit case from 2022. It says that evidence of secondary considerations must always be considered before reaching a determination on obviousness, and that the nexus requirement goes to the weight that the evidence should be given, not the admissibility.

And there's plenty of cases from this district, as well, as Your Honor knows, on that point.

And that brings me to perhaps the final point,

which is we didn't hear any argument today and there's not really any in the briefs either about any prejudice that would be suffered under Rule 403 by presenting this. If anything, there'd be prejudice the other way, because we -- all the requirements have been met from Headwater's part to present expert and non-expert opinions according to the law on all these non-infringement -- issues that go beyond the issue of infringement, which is what this MIL is about.

And because the law also says that evidence of secondary considerations must be considered when they're available, we would suffer great prejudice actually if this was precluded.

THE COURT: All right. Thank you, Mr. Mirzaie.

MR. ROSENTHAL: Your Honor, I have a few responses.

THE COURT: All right.

MR. ROSENTHAL: First, I want to clear one thing up. I must have heard about 20 times during that presentation that we have agreed that the ItsOn product practices these patents. That has never, ever, ever been the case. We have not once said that, not in a single piece of paper, correspondence, anything. We have never said it.

The only thing that we did is we wrote a letter in May of 2024, which is Exhibit 14, which is our Arctic Cat

letter. And I saw some quotes of that Arctic Cat letter up on the screen, and none of those said it. What we said is you have said that you practice your patents. Well, based on that -- and I'll read exactly the language so I'm not paraphrasing it.

THE COURT: I understand the issue about that. The Arctic Cat case talks about the Defendant having a belief that the unmarked product practices the patent, and obviously it is a low bar, but I know that the -- y'all are fighting back and forth.

Whether what you have done is enough to satisfy your Arctic Cat burden is an issue we'll take up otherwise. But I do understand that you have not said the words that -- that they're suggesting.

MR. ROSENTHAL: And thank you, Your Honor.

And I would also direct the Court to your decision in the Barkan Wireless case, 2021 Westlaw 8441751, in which you said that the bar for Arctic Cat is whether or not there -- they have identified products that, quote, potentially practice the asserted patents.

And in this case, we have a Plaintiff who said at that time we practice all of our patents. And so our response was, okay, well, then, you've got a marking obligation. And that was the end of it.

And so at the core, this issue has nothing to do

with that. This issue that is presented by our motion is -- I think you said it very, very well -- it's whether they have competent evidence of any kind that they practice the asserted claims of these two patents.

Now, you asked several times what that evidence was, and finally at the end of the presentation, counsel gave you some examples of what he relied on. There are a few categories.

First, he said I've got Dr. Raleigh. Dr. Raleigh said, well, because it's on our page, therefore, we practice.

Well, that's not competent evidence for a couple of reasons. First of all, as this Court has held in several cases, including the SSL case that we cited in our brief on Page 2 of our MIL, fact witnesses can't offer expert opinion testimony. And expert opinion testimony includes whether or not this particular product practices. That's doubly true here where this particular fact witness, Dr. Raleigh, stated over and over and over again that he cannot assess infringement without experts in this particular case with respect to these patents. And he did that because he was trying to explain away why he didn't sue or write a letter for 10 years. And he said in that context, I couldn't because you need experts to understand whether there's infringement or not.

02:13:40 So that's not competent evidence for that reason.

02:13:43 It's not competent evidence for the second reason, which is we actually -- he's relying entirely on the marking page. So we asked the person that put together the marking page, Ms. Jacobsen. And she said: All we know is we would have done one claim or more.

02:14:01 THE COURT: And, Mr. Rosenthal, you don't have to repeat the argument you've already made.

02:14:05 MR. ROSENTHAL: Fair enough. Thank you.

02:14:07 So, Your Honor, what I do want to talk about in direct response to what counsel said is, number one, there was a -- well, I don't remember the word right now, but an argument that we are not making. They keep saying we don't have to have an expert do a claim-by-claim mapping. That's not what we're arguing. What we're saying is there's got to be something, and we have experts here who have said nothing.

02:14:32 And by the way, I do want to -- one point that I was surprised to hear. Counsel said, well, I know that Dr. Wesel said understand, but he really means an opinion. That was just a -- you know, that was just a poor choice of words, in effect.

02:14:47 If I could have the ELMO, please. Thank you very much.

02:14:50 This is Dr. Wesel's testimony. I took his

deposition. I asked him about that word. I said somewhere -- I said: You believe that the ItsOn software practiced the asserted claims, right?

He said: Yes, that's my understanding.

Have you done any analysis of the ItsOn software?

I have not.

Okay. That's your understanding, though. Correct?

That's my understanding.

I mean, I asked him if he'd done any analysis, and he said no. He's just stating an understanding.

Counsel said there's pages and pages of analysis than precedes it. That is false.

The only thing that they've ever pointed to is Paragraph 84 and 85, which immediately precede 86, and those simply say -- and I showed Your Honor the pages, nothing to hide -- they simply said it's marked on the marking page. And it all comes down to that.

Raleigh says because it's marked. Jacobsen says because it's marked. Wesel says because it's marked. And de la Iglesia says because Wesel says. It all comes down to the very simple fact that because they put this on their marking page, they get to tell the jury that they're practiced.

And this is a proper MIL because as soon as they

say that their product practiced these claims, it's not just about secondary considerations. It's not just about willfulness, although it's also about those things. All of a sudden these patents carry an air of significance, of commercial viability, of -- as though there's something to these claims because they practice them. And that's -- there's simply no evidence of that.

And so we are not asking for a claim chart. We're not asking for a mapping. We're asking for some piece of competent evidence that someone has looked at these particular claims and decided that these particular claims are in the product based on looking at some evidence. And that has not happened in this case.

I do want to address the Centricut case because that was a centerpiece of the discussion. The Centricut case says it is possible. There may be in some circumstances a situation where you don't need expert testimony. If you, for instance, had a patent on a chair and I say, hey, my chair has three legs and it's got a seat and it's got a back and that's all that's in the claim, ordinary jurors could understand, okay, that's enough for me to conclude.

But the vast majority of cases, including complex patents -- and I got to say there's literally thousands of pages of expert reports on whether or not the accused

products infringe, based on analysis of source code, technical documents, all of this stuff that is the subject of this case, and they're saying when it comes to their own product, they literally don't have to do anything.

We're not saying the bar is the same. We're saying there is a bar. There is some modicum of evidence that must be presented for them to proceed to tell the jury that these two claims were actually used. And they have -- counsel said Defendants aren't saying we have zero evidence. That is exactly what we're saying. There is zero competent evidence of practice in this case. There is innuendo. There is the fact that a patent made it on a marking page.

I don't want to overstay my welcome. Let me just make sure that there's nothing else.

Oh, this whole point about nexus. They said, well, nexus does not need to be tied to the claim as a whole, it can be tied to individual elements. None of their experts did that. Their experts are very, very plain. They say: ItsOn practices, and, therefore, evidence that ItsOn was copied is relevant. They say: ItsOn practices, and, therefore, evidence of what Samsung did is irrelevant.

They never say: Oh, well, because these aspects of the claims are in there, I've tied it to that.

02:18:41 And counsel didn't show you any of that, they
02:18:44 didn't put any of that in the briefs because it didn't
02:18:48 happen.
02:18:48 And I believe that is all I have. Unless you have
02:18:50 other questions, Your Honor, that's all I have on this one.
02:18:53 THE COURT: No, I do not.
02:18:54 MR. ROSENTHAL: Thank you very much.
02:18:55 MR. MIRZAIE: Your Honor, if I could just have a
02:18:57 couple minutes, just a few things that I need to correct
02:19:00 the record on with what Mr. Rosenthal said.
02:19:02 THE COURT: All right. Very briefly.
02:19:03 MR. MIRZAIE: I appreciate it, Your Honor.
02:19:04 We're not going to belabor the Arctic Cat point.
02:19:11 They said what they said, and they can't have it both ways.
02:19:15 But that's not -- the Court doesn't need to decide that for
02:19:17 this MIL in order to deny it, Your Honor.
02:19:18 Again, for any issue in the case relating to
02:19:25 whether ItsOn practiced, which is marking, and we've, I
02:19:27 think, already decided we have no -- nothing to be done
02:19:28 there. The only other issue could be secondary
02:19:32 considerations, and it's only our burden of production.
02:19:34 There's no expert testimony requirement for ItsOn
02:19:37 practicing on that issue either.
02:19:43 Mr. Rosenthal still hasn't cited a case.
02:19:45 Defendants still have not cited a case for that

02:19:49 proposition. Centricut does not stand for that
02:19:50 proposition.
02:19:51 Now, in terms of nexus, Mr. Rosenthal is incorrect
02:19:56 about that issue, and I want to make sure that in addition
02:19:59 to the cases, the Court understands that we have a second
02:20:02 expert in this case, and that is Mr. de la Iglesia. He's
02:20:08 our validity expert, and I'm not exactly sure right now
02:20:13 whether this is an exhibit to our briefs on this topic, but
02:20:17 it is, I think, an exhibit to other briefs. And his report
02:20:22 at Paragraphs 421 to 437, and we can provide that -- if the
02:20:27 Court doesn't have it, we can provide it to the Court at
02:20:31 some point today.
02:20:32 Those are 17 paragraphs where he details the nexus
02:20:40 to claim elements from ItsOn, Your Honor. So I -- we
02:20:45 certainly don't want to make -- we want to make sure that
02:20:48 doesn't get lost here. And I think -- therefore, I think
02:20:51 that in summary, there's no requirement in Centricut or
02:20:54 otherwise for practicing products that are licensed.
02:20:59 So not infringement, but for practicing products
02:21:01 that are licensed, for Headwater to provide anything other
02:21:05 than the burden of production identifying it.
02:21:08 We've gone way further than that in citing
02:21:11 evidence, talking through the marking page, and actually
02:21:15 providing nexus, including with expert testimony in those
02:21:21 17 pages of Mr. DLI's report to claim elements of the '541,

for example. And while that wasn't required from us, we went ahead and did it anyway.

And what the WBIP case makes clear is that one element will do. And so we have gone into that linking for nexus, and all of the other arguments go to weight, not admissibility.

Thank you.

THE COURT: All right. Thank you, Mr. Mirzaie.

I'm going to carry this MIL. I want to look further at both the exhibits and the cited cases.

So we can move on to Defendants' Motion in Limine No. 2.

MR. ROSENTHAL: Thank you, Your Honor.

MR. FENSTER: Your Honor, may I just ask to be excused?

THE COURT: You are excused.

MR. FENSTER: Thank you.

MR. ROSENTHAL: Okay. MIL No. 2, I believe, will go much more quickly than MIL No. 1.

Our argument here on MIL No. 2 is that Headwater has made allegations of copying, specifically copying the ItsOn product. It is our view that those should be excluded from this trial.

Now, the first and foremost reason is that if you agree with us on MIL 1, that there's no competent evidence

that the ItsOn product practiced, then by definition, copying of a non-practicing product, unless they've linked it to something specific in the accused -- in the -- in the -- in the claims, which they have not, they've said that there's evidence of copying the ItsOn product as a whole and that, therefore, that is secondary considerations of non-obviousness.

Definitionally -- and we've cited, I think, seven or eight cases in our -- in the opening few lines of our brief. Definitionally, if the product doesn't practice, copying is irrelevant. And case upon case upon case has excluded evidence of copying in those circumstances.

So if MIL 1 is decided in our favor, MIL 2 is necessarily decided in our favor, in our view.

However, even if MIL 1 is not decided in our favor, there are independent reasons to not allow these allegations of copying. Now, in the briefing, there are two instances of copying that have been distilled down as what's really at issue, Verizon's alleged copying and Samsung's alleged copying.

With respect to Verizon's alleged copying, we heard yesterday from Mr. Fenster that they are narrowing and limiting that to one single instance, and that is the allegation that Mr. -- I'm sorry, Russell, I couldn't remember Mr. Russell's name -- that Mr. Russell said that

he saw someone take a PowerPoint presentation and pass it off as Verizon's own. That's what Mr. Fenster said is their Verizon copying allegation.

There is no testimony at all that anything in that presentation meets the claims of the patent. There's no connection whatsoever between that presentation and what's in the patent.

So whether or not MIL 1 goes our way, at least with respect to Verizon's copying, that -- that should not be there.

And by the way, that is entirely premised on the '042 patent. And for the '042 patent, we know that there's no evidence of practicing the '042 patent because I asked their expert, Dr. Cooklev: Do you have any opinion as to whether or not the accused -- the ItsOn product practices the '042 patent?

And he said unequivocally in his deposition: I have no opinion. I have not done any analysis of that.

So that's an easy one.

So since the entire foundation of that alleged Verizon copying is based on the '042 patent and the '042 patent alone, which -- and by the way, those activities happened four years before the '042 patent even issued in 2010 -- April of 2010, because there's absolutely no connection between what was allegedly copied and the '042

02:25:48 patent, there's not even a link between the '042 patent and
02:25:52 the ItsOn product, let alone that presentation, all of that
02:25:56 evidence should be excluded because it's irrelevant, and
02:25:59 because it's immensely prejudicial to hear an argument by
02:26:04 the other side that we copied something that has nothing to
02:26:07 do with the issues in this case is by its nature
02:26:14 inflammatory and prejudicial. And unless they can tie it
02:26:16 to something that's at issue in this case, which they
02:26:20 cannot, it should be excluded.
02:26:21 THE COURT: Is this an issue in a separately
02:26:23 pending motion?
02:26:24 MR. ROSENTHAL: It is a subsection of our MIL 2.
02:26:27 So if you look at our MIL 2 on Page 4, our MIL 2 is about
02:26:39 no argument or evidence that anyone copied ItsOn.
02:26:42 And then within that, we talk about evidence
02:26:45 related to Verizon's alleged copying and Samsung's. And if
02:26:49 you look at our reply, it's very laid out. I think we have
02:26:53 separate headings for it in our reply.
02:27:01 THE COURT: I'm confused. I thought we were
02:27:03 talking about your MIL 2 now.
02:27:05 MR. ROSENTHAL: We are, yes.
02:27:06 THE COURT: And I'm asking if your MIL 2 is also
02:27:11 in -- asserted in another pending motion? In other words,
02:27:16 is this a part of --
02:27:18 MR. ROSENTHAL: Oh.

02:27:20 THE COURT: -- this argument a part of some other
02:27:23 motion you've got?
02:27:23 MR. ROSENTHAL: I'm sorry, Your Honor. I
02:27:24 misunderstood the question.
02:27:26 We do have summary judgment motions on copying
02:27:28 allegations. So we have a summary judgment of no copying
02:27:30 that raises many of the same issues. Of course, in that
02:27:34 circumstance, the issues are whether or not there is
02:27:37 sufficient evidence to go to the jury on those questions.
02:27:39 This, of course, is from a different vantage
02:27:42 point. This is from the question of whether there is any
02:27:45 relevance to this evidence and whether or not there's
02:27:48 sufficient prejudice that outweighs that relevance. And so
02:27:52 this is from a different angle.
02:27:54 Of course, if the Court agrees with respect to the
02:27:58 copying allegations, that there's insufficient evidence to
02:28:01 go to the jury, then we don't have to get to this MIL.
02:28:04 I will say that when we moved for summary judgment
02:28:07 of no copying, Headwater didn't even point to these Verizon
02:28:11 allegations as evidence on which it would rely. So from
02:28:15 our understanding, they've abandoned that.
02:28:17 Now, we may hear differently, but that wasn't even
02:28:20 part of their defense to our summary judgment motion. So
02:28:20 when we talk about these two categories and we talk first
02:28:26 about the allegations that Verizon copied, they're not even

relying on those as a reason to go to the jury on the question of copying. But that's a summary judgment issue.

Our argument here with respect to the MIL is that there is no relevance to this because there's no connection to the patent, and the prejudice far outweighs any potential relevance.

THE COURT: If you lose the summary judgment motion --

MR. ROSENTHAL: Yes.

THE COURT: -- and the decision is that there is sufficient evidence to take it to a jury, how is this MIL consistent with that?

MR. ROSENTHAL: Well, because there's still the question of whether -- even if there is a tiny bit of relevance, if they've been able to piece together because, hey, it generally deals with ItsOn, even though it's not specifically connected to the patent, and they can argue sort of by the hair of the nose that they're able to get something before the jury, there's still a question of whether or not there is prejudice that outweighs that relevance.

So we think that this implicates some of that.

I will say I think in assessing the summary judgment motion, it is likely that the Court will assess whether there is admissible evidence that they could

present, and if the Court finds that there is, it probably is the case that we're going to lose this MIL, as well. But I think legally, logically, there is a wide space between the two.

THE COURT: It has to be admissible in order to matter on summary judgment.

MR. ROSENTHAL: That's absolutely right, Your Honor. And so if the Court considers the question of prejudice with respect to the summary judgment motion and considers all of that and determines that they have competent evidence that is, in fact, connected to the patent that is not outweighed by the prejudice and that's a decision the Court makes in resolving the summary judgment motion, then, of course, that resolves this issue, as well, in the MIL.

THE COURT: All right. Well, I don't see any benefit in assessing this evidence twice. So I think the logical thing to do is to defer this MIL to consideration with your motion for summary judgment and --

MR. ROSENTHAL: I'm sorry, Your Honor, I didn't mean to interrupt.

THE COURT: Go ahead.

MR. ROSENTHAL: I'm so sorry.

I understand and agree with that, and the only thing that I'll add is that with respect to the second

category of alleged copying, which is the Samsung issue, there is a special prejudice involved there that even goes beyond the Verizon allegations.

So we have the argument, of course, that if Samsung copied the ItsOn product, and there's no evidence that the ItsOn product meets the claims, then there's no relevance. And we've made that argument in our summary judgment motion, and we've made it here.

There is -- in that circumstance, there is an extra prejudice even beyond the Verizon allegations. And that extra prejudice is Samsung's not part of this case. We will now have to be defending and explaining why Samsung, a party not -- not here in this case, did or did not copy. We don't have the benefit of having Samsung here to defend itself.

And by the way, this Court excluded those allegations in the actual Samsung case. So we are now fighting a fight that didn't happen in the Samsung case. And by the way, Samsung was actually found to not infringe that patent in the first trial.

And so we're now forced to defend ourselves about Samsung's alleged copying when Samsung was determined by a jury to have not, in fact, copied. And that puts us in a uniquely prejudicial situation. And it would require a trial within a trial as to whether Samsung did, in fact,

02:32:06 copy the ItsOn product.

02:32:07 THE COURT: I don't know that the jury made a
02:32:10 decision about copying. They made a decision about
02:32:13 infringement.

02:32:13 MR. ROSENTHAL: Certainly that's true. And in
02:32:16 determining that the product that Samsung made and sold in
02:32:20 that case did not meet the elements, they certainly made
02:32:24 some conclusion about the comparison between what Samsung
02:32:28 did and what was in that patent.

02:32:29 Now, does that necessarily mean they rejected the
02:32:33 copying allegations? No. But it is probative of that
02:32:36 question.

02:32:36 THE COURT: I think the Court excluded the copying
02:32:42 allegation, if I'm remembering right.

02:32:44 MR. ROSENTHAL: That's true.

02:32:45 THE COURT: So I don't think that issue was
02:32:46 presented to the jury.

02:32:47 MR. ROSENTHAL: It was not, Your Honor. And I
02:32:48 guess that's my point is -- that's exactly right.

02:32:51 THE COURT: You just said the jury rejected it.

02:32:53 MR. ROSENTHAL: No, no. What I mean is there's
02:32:56 nothing that we can discern about whether the jury actually
02:33:03 assessed the copying question, per se, but what the jury
02:33:03 did do is determine that Samsung's products do not meet the
02:33:06 elements of the claims. How could Samsung have copied the

elements of the claims if they don't meet the elements of the claims? That's the point.

And my point is if they are permitted to have a trial within a trial in this case and to argue to the jury that Samsung copied the patent, we will have to then say -- or at least we ought to be able to say -- we ought to be able to say, well, a jury actually determined that the product that you say is a copy does not actually meet the claims.

Now, I don't think we're going to be allowed to say that. I'm quite sure I'm not going to be allowed to say that, but that's the prejudice of allowing this trial within the trial.

The prejudice is we're now going to have a fight in a case where there's a lot for the jury to actually look at. We're going to have a fight about whether our products infringe. And what they want to do is say, well, some other company that's not here in this court copied the ItsOn product.

And not only is there no evidence that the ItsOn product relates to the patent claims, the evidence actually suggests that Samsung didn't actually copy it. And that's the point. That's what's so prejudicial about allowing that copying allegation in, whether we win MIL 1 or not.

THE COURT: All right.

02:34:19 MR. ROSENTHAL: I fear from your expression that I'm not making that point, but I don't know if there's any questions that I can help answer.

02:34:27 THE COURT: I don't think so.

02:34:28 MR. ROSENTHAL: Okay.

02:34:29 THE COURT: I'm going to take up MIL 2 in connection with the motion for summary judgment that you have fully briefed.

02:34:37 MR. ROSENTHAL: That makes sense, Your Honor.

02:34:39 I'm happy to move to MIL 3.

02:34:41 THE COURT: All right.

02:34:41 MR. ROSENTHAL: So with respect to MIL 3, MIL 3 -- first of all, we have made some pleasant end roads to MIL 3. The parties have agreed just this morning, and I believe we have agreed language that we are either going to -- we did, in fact, send to the Court that there is a piece of MIL 3 that we have agreed to for the Verizon case.

02:35:03 MIL 3 is Verizon's motion to exclude evidence of the communications and relationship between the company ItsOn and Verizon.

02:35:14 One of the key pieces of evidence that they sought to admit, until this morning, was that Verizon paid a bunch of money to ItsOn and invested a lot of money in ItsOn. They have now agreed that they are not going to present that evidence, so that aspect of our MIL is now agreed.

02:35:34 What remains are the other aspects of the
02:35:39 Verizon/ItsOn relationship. So Verizon entered into an NDA
02:35:42 with ItsOn in 2010. They received samples. They
02:35:49 trialed -- they did some trialing of the software. They
02:35:52 paid money for that trial. Ultimately they didn't go
02:35:55 forward.
02:35:56 Now, what we have seen from many, many pages of
02:36:00 their expert reports is that they want to, from that,
02:36:03 create the impression that somehow Verizon looked at all of
02:36:09 this stuff, and we decided, oh, we don't need to pay for
02:36:12 all of this. We don't need to enter into this
02:36:15 relationship. We can do it all ourselves.
02:36:17 Now, there's all kinds of problems with that
02:36:19 theory, but that seems to be the theory that they're trying
02:36:22 to present. And the fact is that none of that has any
02:36:24 relevance to this case.
02:36:25 ItsOn, as we've already talked about, is a piece
02:36:28 of software for which there is no evidence, whether it
02:36:30 practices the claims of these patents. If there's no
02:36:33 evidence that the patent is practiced by this product, then
02:36:36 whether we contracted with them for the product, whether we
02:36:39 trialed the product, the results of those trials, all of
02:36:42 that stuff has nothing to do with the issues in this case.
02:36:45 There are two -- you know, they've already agreed
02:36:50 they're not going to put in the investments, but there are

two other aspects that are in particular prejudicial.

The first is the NDA. They want to enter into evidence an NDA that Verizon and ItsOn got into. I don't know what possible relevance that has to this case. The only possible thing that we can think of is they want to suggest to the jury that somehow that NDA was violated, that somehow we did something improper with respect to that NDA. And that's just not appropriate at all, and there's no probative value of the NDA itself. It has nothing to do with the issues in this case.

So at a minimum, that NDA should be excluded.

And the second specific example is the trials. The fact that we received software from them, we tried it on our phones in, I think, it was early 2011, there's results of those trials, that has nothing to do with the issues in this case, and it has nothing to do with it because what we were trialing had nothing to do with these patents.

What Sprint -- what Verizon was interested in was something called a -- like a meter, a usage data meter for how much usage you're using. How much data am I using at this moment?

It had nothing to do with intercepting. It had nothing to do with turning the Internet on and -- on for background apps when they're not interfacing. It had

02:38:15 nothing to do with any of that. And there's no evidence at
02:38:17 all that anything that we were trialing met any of the
02:38:22 claims that are at issue in this case. And we've just
02:38:24 talked about that.
02:38:25 And so what they're trying to do is create the
02:38:28 impression that we looked at the patented technology, we
02:38:32 tried it, and then we went and infringed. And none of that
02:38:35 is true. But putting aside whether it's true, they have no
02:38:39 evidence connecting anything that we did to the actual
02:38:42 patents in this case.
02:38:43 And then the prejudice, once you -- once the jury
02:38:46 hears that we tried this software and decided not to go
02:38:49 forward -- we didn't actually decide not to go forward.
02:38:52 The company just went bankrupt. But once we -- once that
02:38:57 evidence -- once that suggestion gets before the jury,
02:39:02 there's no coming back from that. The jury is now infected
02:39:02 with that, and it really has nothing to do with the case.
02:39:07 So we believe the entire communication, the entire
02:39:09 relationship between Verizon and ItsOn should go -- we just
02:39:12 don't see how it's relevant at all. But at a minimum, in
02:39:16 addition to the investments, the NDA and the trials should
02:39:20 be excluded from evidence.
02:39:22 And I had only one more point that I wanted to
02:39:25 make, and that is with respect to the investments.
02:39:28 Curiously, the Plaintiff has agreed that they are not going

to introduce Verizon investments in the Verizon case, but they maintain that they would like to talk about the Verizon investments in the T-Mobile case.

Now, that's even more attenuated for the T-Mobile case. The fact that Verizon invested money in ItsOn, in the T-Mobile case, has nothing to do with the T-Mobile case. And it's totally detached from the patents.

As the Court knows, ItsOn had 88 patents or something like that at the time. And the Court has already made rulings in this case and in the Samsung case that investments in the company as a whole do not bear and are not sufficiently connected to talk about what the value of an individual patent is. And the same is true of the investments with respect to ItsOn.

We do not think it's appropriate that they can introduce evidence of Verizon's investments in the company as a whole which creates this impression that somehow Verizon valued the patented technology when there are literally dozens and dozens and dozens of other things that were -- that ItsOn had in addition to the particular patents here.

So for the same reason that the Court found that investments in ItsOn doesn't give any information about the value of a patent, it also doesn't -- isn't relevant to the value of the patent in this circumstance.

And so we would ask that the Court also rule that that -- those investments should be excluded from the T-Mobile case, as well.

THE COURT: All right.

MR. ROSENTHAL: Thank you, Your Honor.

THE COURT: Thank you.

MR. WIETHOLTER: Good afternoon, Your Honor. Jason Wietholter for Headwater.

First of all, Your Honor, Verizon's position is now a much, much narrower version of their title for this MIL. Their title for this MIL is: No Argument or Evidence Regarding Headwater or ItsOn's Pre-Suit Communications with Verizon.

Based on Verizon's argument just now and T-Mobile's argument just now, it's specific to ItsOn and ItsOn's pre-suit communications with Verizon, not Headwater.

And with respect to the two issues that are still live in the Verizon case, the NDA and the trial, both of these pieces of evidence are relevant to show a whole host of different -- or support a whole host of different arguments from Headwater and contentions from Headwater in this case, including marking, damages, willfulness, secondary considerations, and to rebut certain arguments that -- that Verizon and T-Mobile are going to make, such

as the ItsOn software was -- had poor -- was buggy and was insecure.

But all of this evidence about ItsOn's pre-suit communications, the fact that Verizon knew of ItsOn, knew of the technology, trialed the technology, paid for the trial of the technology, all that evidence is relevant to rebut those allegations about ItsOn's software and how -- how it actually operated.

And then separately, it's also affirmative evidence for Headwater to show that Verizon was aware of Headwater and ItsOn's technology, how it operated, that it was -- that there were multiple patents that had been applied for that were in the process of being issued, that ItsOn's software was ultimately marked.

THE COURT: And what is the relationship between those arguments that you want to make and the question whether ItsOn practiced the asserted patent?

MR. WIETHOLTER: So, Your Honor, irrespective of whether ItsOn practiced the asserted patents, the evidence still is relevant to show what Headwater and ItsOn were sharing with Verizon about Headwater's technology that would issue in further patents.

So irrespective of whether ItsOn actually practiced any of the patents, which seems to be the subject and will be decided and probably rise and fall with the

02:43:48 other MILs and issues, what Headwater shared and what ItsOn
02:43:52 shared with Verizon about Headwater's technology that was
02:43:56 going to be implemented in ItsOn's functionality or that
02:44:00 was implemented in ItsOn's functionality is relevant to
02:44:03 show that Verizon, again, knew of Headwater and ItsOn, knew
02:44:06 that the patents -- knew about Headwater and its patents
02:44:12 and what it was planning to do with its patents and its
02:44:15 portfolio, and then also how all of that rebuts Defendants'
02:44:20 obviousness allegations, how all of that rebuts their
02:44:23 marking and failure to mark allegations.
02:44:30 In our -- in -- with respect to willfulness,
02:44:34 willfulness is also in our briefing on that issue, which I
02:44:34 believe is Docket 203, our opposition to their MSJ. The
02:44:40 Gustafson case specifically says that willfulness is based
02:44:43 on all of the circumstances or all the circumstances. It's
02:44:45 not a single specific fact that happens at one moment in
02:44:49 time, but rather it's all the facts and circumstances that
02:44:52 can give rise to willfulness or willful blindness.
02:44:55 If there is never -- if there isn't a patent
02:44:59 that's issued or if -- or if there isn't a patent
02:45:00 identified by number, the facts are still relevant to
02:45:01 willfulness and willful blindness.
02:45:05 So all of that is probative of the issues with --
02:45:10 that permeate this entire case on various different fronts,
02:45:15 irrespective of whether or not ItsOn itself actually

practiced those patents.

And Defendants really want to have it both ways, and they want to argue that, you know, Headwater's patents are obvious, but they don't want us to be able to talk about evidence to rebut that based on Verizon's own actions.

They want to argue we failed to mark, but they don't want us to be able to talk about how ItsOn marked or came to mark.

They want to talk about how -- or they want to refute this allegation about willfulness, but they don't want us to be able to talk about all the facts and circumstances that lead to that.

So this MIL is really clearly about facts that are relevant to a number of different issues here. And this isn't a case where Headwater is asserting some fact from, I don't know, like a market report or something that's not tethered to the issues in this case. These are facts of Verizon's own making. These are facts that shouldn't be prejudicial to Verizon because Verizon or T-Mobile themselves had interactions with Headwater and ItsOn.

And so whatever those facts show, those are -- to the extent that they are prejudicial to Verizon and T-Mobile, that prejudice is of their own making. It's not something that Headwater has unduly created or that would

outweigh that relevance to all the various issues in the case.

THE COURT: All right. Thank you, Mr. Wietholter.

MR. ROSENTHAL: Your Honor, I just have a few brief responses.

The first that I'll raise is, you know, there's a fundamental unfairness of them being able to tell the story of the ItsOn relationship that they say is relevant to all of these things. And that really goes back to what Mr. Krevitt was arguing yesterday. You know, this is -- this is the problem. The problem is they want to tell this story about alleged willfulness and communications and trials and all that stuff, but there's a vast trove of documents that no longer exist that we don't have to fight back and to actually explain what the product really was.

So that's -- that's a -- I just don't want to lose sight of that's what we're talking about. That's the prejudice that Mr. Krevitt was talking about yesterday.

Second, counsel went on at length for all the reasons that he thinks that this whole story is important, that we trialed the technology, that we knew of the technology, that we paid for the technology.

What is "the" technology? This is only relevant -- it's only relevant if there's some connection between that technology and these patents, and that's

02:47:57 MIL 1. There is none. And so I don't think they have an
02:48:01 argument. I really don't. If we win MIL 1, MIL 3 should
02:48:05 be -- should follow like a domino.
02:48:08 Now, even if we lose MIL 1, nonetheless we already
02:48:12 know that there's a huge amount of stuff in this
02:48:15 relationship and a huge amount of stuff in these products
02:48:18 that are unrelated to the patents. We know that because
02:48:21 they say they practice, you know, 88 different patents in
02:48:24 these -- in these products.
02:48:27 And so we know that there's no -- no sufficient
02:48:30 connection that we can draw any inference about the value
02:48:33 of this technology merely from the fact that Verizon
02:48:36 decided to trial an ItsOn product that may or may not have
02:48:41 practiced this particular patent but certainly has tons of
02:48:43 other things in it. And that really is the decision that
02:48:47 the Court has already made with respect to valuations.
02:48:50 It's the same analysis. The fact that somebody has looked
02:48:53 at a product or learned information, unless you tie it
02:48:56 somehow to the patent, that's -- that's insufficient.
02:48:58 So from our perspective, whether -- if we win
02:49:05 MIL 1 -- in other words, if they can't establish through
02:49:07 some evidence that this product or these products that
02:49:11 ItsOn had had any connection at all to these patents, then
02:49:15 all of the relationship and discussion about them should go
02:49:19 out the door.

But even if we lose MIL 1, there's independent prejudicial reasons and lack of relevance reasons to exclude this evidence.

I do want to raise just two additional points. The first is I didn't hear anything about the NDA. I didn't hear anything about why the NDA is relevant, and the reason is it's not. And it really has nothing to do with this case. That should be an easy first step in this particular MIL.

And with respect to the trials, I didn't hear anything about why the trials in particular bear at all on the value here, the fact that we trialed this -- this software. Even if it practiced the claims, the fact of the trials -- I mean, they've already agreed that they're not going to talk about the payments for the trials, so why are we talking about the trials themselves? It has the same prejudicial effect.

So at a minimum, those should be excluded.

THE COURT: You're saying even if it -- even if the trials practiced the claims, you would say it's irrelevant?

MR. ROSENTHAL: Yes, Your Honor. It has marginal relevance. I'm not sure what the fact that we trialed a product, what -- the fact that Verizon -- let's assume for a moment that they had evidence that it actually practiced

02:50:25 the patents, which by the way didn't issue. The patents
02:50:28 didn't issue until years later. So none of the patents had
02:50:31 actually issued at this time.
02:50:33 All right. The trial happened in 2011. The first
02:50:36 of the patents issued in 2013. So at that time, for the
02:50:43 product that was being trialed, let's say it did have the
02:50:45 elements of the claims, the fact that we looked at that
02:50:50 product and tried it out, what does that go to? It doesn't
02:50:53 go to anything.
02:50:57 THE COURT: You're saying there was no application
02:50:59 pending at the time?
02:51:00 MR. ROSENTHAL: There were applications -- there
02:51:00 was a parent application for one of the patents -- or for
02:51:02 some of the patents, I should say. The priority date is
02:51:04 earlier. I think of the three patents, two of the actual
02:51:07 applications hadn't even been filed yet.
02:51:12 So at the time that these trials were happening,
02:51:14 it's not like it could probably be evidence of willfulness
02:51:18 because the patents didn't exist at that time.
02:51:19 So this argument that somehow this is evidence of
02:51:21 willfulness, they never told us anything about these
02:51:23 particular patents. They never said, you know, that
02:51:27 there's -- these features that we're talking about here are
02:51:29 going to be patented. They did, of course, say generally
02:51:33 our products are covered by patents, but as the Court

knows, that's not sufficient for willfulness.

What they want to do is they want to blur the lines. What they want to do is say, hey, you all trialed the product, and it's called ItsOn, and ItsOn licensed patents from Headwater. Therefore, these particular claims of these patents were copied. That's what they're trying to do.

And it's exactly that broad-brush approach that we think requires the Court to step in and exercise its gatekeeper role to say there's not a sufficient connection to these patents in this case to justify the prejudice that comes from telling that story. There's just not a sufficient connection. And that's our point, especially, Your Honor, with respect to those two pieces of evidence. We think with respect to the whole relationship, as well.

And the last point I want to make is I didn't hear any response at all to why the investments that Verizon made has any relevance whatsoever to the T-Mobile case. So, again, at a minimum, that should be excluded, as well.

THE COURT: All right.

MR. ROSENTHAL: Thank you, Your Honor.

THE COURT: Thank you, Mr. Rosenthal.

As far as the T-Mobile issue goes, I'll circle back to that when we take up that case separately.

MR. WIETHOLTER: Thank you, Your Honor.

02:52:54 THE COURT: I understand there'll be other
02:52:56 arguments then.
02:52:56 But I'm going to decide the first motion in limine
02:53:06 for Defendants before reaching this one.
02:53:15 So we can move on to --
02:53:17 MR. WIETHOLTER: Your Honor?
02:53:18 THE COURT: Yes.
02:53:19 MR. WIETHOLTER: Your Honor, if I may, a couple of
02:53:20 points of clarification on this MIL No. 3.
02:53:23 THE COURT: All right.
02:53:25 MR. WIETHOLTER: As we've already discussed at
02:53:27 length, we do have sufficient facts, evidence, and opinions
02:53:33 in this case from both of our experts on invalidity issues,
02:53:39 Erik de la Iglesia and Mr. Cooklev, on nexus and secondary
02:53:46 considerations that apply, even setting aside the issues
02:53:52 from MIL No. 1 -- Defendants' MIL No. 1.
02:53:57 And as we state in our briefing, as to the value
02:54:02 of the trials and the value of the work that was done with
02:54:10 Verizon, including the investments which I'll address in
02:54:13 more detail later, the amount of that value isn't necessary
02:54:16 to show any of the facts that we're contending are relevant
02:54:20 here. The very fact that Verizon was interested in
02:54:25 Headwater's patented technology in ItsOn is evidence to
02:54:30 support secondary considerations and to rebut certain of
02:54:35 their allegations that they're making in this case about

02:54:38 ItsOn.

02:54:38 So even if the value -- the amount of that value
02:54:43 is out, is irrelevant, the fact that they hired the
02:54:48 companies involved in this case to implement the technology
02:54:52 is relevant to the issues.

02:54:53 And the NDA -- I think maybe I didn't say it as
02:54:58 artfully or as clearly as I wanted to, but the NDA is
02:55:02 relevant to show when Verizon was aware of Headwater and
02:55:05 ItsOn and when they began to work with them and that the
02:55:08 technology was important such that it was covered by an NDA
02:55:12 to protect that confidential technical information.

02:55:22 And in particular, the de la Iglesia paragraph,
02:55:27 just so we're clear in the record -- and this is in Docket
02:55:30 184-2, Paragraphs 421 through '77, and Mr. Cooklev's
02:55:37 report -- I apologize, I don't have the docket number
02:55:40 handy. I will get that for the Court -- those are
02:55:42 Paragraphs 90 to 99.

02:55:44 And, finally, Your Honor, there -- the Avia Group
02:55:50 International, Inc. vs. L.A. Gear California case, this is
02:55:55 853 F.2d 1557, and this is at 1566. This case -- this case
02:56:12 shows that even -- that willfulness -- willfulness can
02:56:16 result even if knowledge of -- even if there's knowledge of
02:56:21 a patent application that later leads to a patented
02:56:24 invention, that the Defendant ultimately infringes knowing
02:56:29 of the application and the later -- and the later

02:56:36 infringement by using that technology.

02:56:40 So even if the patents did issue after the time
02:56:44 period in which Verizon entered into an NDA with ItsOn and
02:56:51 learned of Headwater and even if the patents issued after
02:56:54 the trials were over, that doesn't defeat the willfulness
02:57:01 claim. That's merely one cog, if you will, in the totality
02:57:05 of the circumstances that should be weighed in the
02:57:08 willfulness determination.

02:57:09 And, Your Honor, Cooklev -- the Cooklev report is
02:57:13 at Docket 185-3.

02:57:20 THE COURT: All right.

02:57:21 MR. WIETHOLTER: Thank you, Your Honor.

02:57:21 THE COURT: Thank you, Mr. Wietholter.

02:57:22 MR. ROSENTHAL: Okay. Your Honor, I'd like to
02:57:24 move to Defendants' MIL No. 4, and this has to do, I will
02:57:31 say, with something that is very narrow. This is a
02:57:35 gentleman by the name of Thomas Russell who was an employee
02:57:39 of Verizon who had dealings with ItsOn in 2010 and 2011.
02:57:46 And he filed at some point a whistleblower lawsuit in which
02:57:52 he alleged that there was some copying by Verizon of
02:57:55 certain things of ItsOn.

02:57:58 And he filed the lawsuit because in his view there
02:58:00 was retaliation against him, and he believes he was forced
02:58:03 out into a lesser role in the company.

02:58:05 So we don't think any of this story has any place

in this trial. This is -- this is truly a trial within a trial. Thankfully, last night and this morning, Headwater has now backed off of much of this. They have now agreed that they will not introduce evidence of the lawsuit, so the actual whistleblower complaint. They will not introduce evidence of any retaliation that was alleged to have occurred. And they will not make any reference to so-called reverse engineering.

Mr. Russell referred to reverse engineering, but he explained very clearly in his deposition he didn't mean reverse engineering, he meant there was a PowerPoint presentation and he saw similar slides in a Verizon presentation, and he thought that they hadn't properly given credit to ItsOn for those slides. That's what this whole thing is about is a slideshow that he thought was replicated within Verizon.

So those three aspects have -- are now off the table. And what is left is our fundamental problem with Mr. Russell testifying that he believes that Verizon copied things from ItsOn, when the things that he alleged to have been copied in 2010 are a PowerPoint presentation that has absolutely no connection to the patent in this case or to the patents in this case.

So let me start with one important thing. One of the things that Headwater keeps saying with respect to all

of this ItsOn-Verizon relationship is, well, there was a patent marking page. I want to make one fact very clear. There was no patent marking page in 2011. That did not exist in 2011.

So any notion that somehow these interactions are relevant because there was a patent marking page, which by the way didn't list any of these patents because the patents didn't exist, but in any event, they said, well, what if you knew about the applications? There was no marking page. So that's just a red herring.

Now, what we argued in our brief is that Mr. Russell's allegations of copying have no connection to this case. And what Headwater said in response has nothing to do with what we argued. Headwater has a page in their brief of bulleted excerpts from Mr. Russel's testimony where Mr. Russell says, well, there were lots of conversations with ItsOn, where he says, we understood that ItsOn had a lot of patents, we understand that if anybody were to use this, we'd have an intellectual property problem. None of that is what our MIL is about.

We have problems with that testimony independently. We'll raise that on deposition designation day. But none of that is what we're complaining about. What we're complaining about and what they haven't agreed to withdraw is the allegations that Mr. Russell makes about

this copying.

Now, this is something that was settled by Mr. Russell out of court. They agreed to waive any claims that anything had gone wrong. Nobody admitted any liability for anything. There was a payment made, and the case was settled. And for us to now have a mini trial about whether or not this copying occurred would require some connection to the issues in this case.

Now, there is zero testimony in this case, zero testimony that what's in that April 2010 PowerPoint has anything to do with the '042 patent. That's the only patent that they say that the ItsOn product practiced at that time was the '042 patent. They have made no connection.

First of all, their expert, Dr. Cooklev, I asked if he has an opinion even about the ItsOn product.

And he said: I have no opinion. I've done no analysis about whether the ItsOn product practices.

We've talked about that.

But it's even worse for the PowerPoint because the PowerPoint has to do with all kinds of things. And the question is, is there anything in that PowerPoint presentation that embodies or captures what's written down in the '042 patent? And -- and there's been no evidence in this case that there is.

So this is just a salacious sort of sexy story that they want to tell, and they're desperate to keep some little part of it, but it just doesn't have anything to do with the case.

I don't have to say much about prejudice, I don't think. I can't imagine something more prejudicial than an insider saying, oh, I saw them copy something, which is, of course, why they want it to be in front of the jury. But unless that's something that was copied is the claims or something to do with the claims and unless there's evidence that it is, which there is not, that's all it is, is a salacious allegation that they're going to use to taint the jury.

So we don't believe that there's any showing at all that this is relevant to anything.

The only other thing I'll say is in their opposition, they point to patent briefs where they say Headwater disclosed to Verizon these things called patent briefs that describe their patent portfolio. That's not the subject of our MIL. We have independent objections to those documents. We'll take that up at the time that we talk about objections to documents. That's not copying allegations.

Our MIL is about Mr. Russell's allegations that something was taken, and that's all this MIL is about.

03:03:32 Thank you, Your Honor.
03:03:33 THE COURT: All right.
03:03:37 MR. CHANG: May I approach?
03:04:04 THE COURT: Yes.
03:05:00 MR. CHANG: Good afternoon, Your Honor. Dale
03:05:01 Chang for Plaintiff, Headwater.
03:05:05 Let me just try to get my slides up here.
03:05:08 Okay. All right. So Mr. Rosenthal said that the
03:05:34 ItsOn presentation that Mr. Russell testified about is
03:05:39 irrelevant to any of the patents in the case. That's just
03:05:43 not true.
03:05:43 So as we'll see throughout this presentation, we
03:05:50 have technical disclosures that ItsOn made to -- provided
03:05:55 to Verizon under that NDA that directly relate to some of
03:06:04 the core features of the patented technology.
03:06:08 Now, for example, on Slide 1, which is the slide
03:06:12 that ends in 986, we talk about controlling at a device
03:06:19 level on a per-application basis network traffic. That's
03:06:24 something that hadn't been done before, and Mr. Russell
03:06:28 testified that Verizon itself thought that this was a
03:06:32 game-changing solution to the problems that it was facing.
03:06:34 On the next slide, we see -- and this is in the
03:06:40 slide deck -- that April 2010 presentation, the page ending
03:06:45 in 992, a description of network traffic characterization
03:06:51 accomplished on the devices. Before it was accomplished in

03:06:55 the network, and that had also sorts of problems. ItsOn's
03:06:58 solution was game-changing in that they moved that
03:07:01 functionality to the device, and they disclosed information
03:07:05 describing how they would do that to Verizon.
03:07:09 Millions of devices individually control traffic.
03:07:13 Each device has perfect visibility. So it's talking about
03:07:17 the benefits, the solution, and some of the ways that these
03:07:22 things would be accomplished.
03:07:23 Next slide, again, conserves network capacity.
03:07:29 Controls device network access behavior at the source,
03:07:33 meaning at the device. Example, background OS maintenance
03:07:35 and software update access. Background traffic control.
03:07:42 We have another example on the slide ending in
03:07:46 998. Example activities that cause difficulties for
03:07:53 carriers like Verizon. Background OS accesses and
03:07:56 information exchanges, constant and inefficient small and
03:08:01 large socket open/close events, software updates,
03:08:06 application background OS accesses, content subscription
03:08:06 service background updates, and it goes on.
03:08:11 And then near the bottom it says: The ItsOn
03:08:13 solution meets these -- the needs of the carrier because it
03:08:17 can control these background accesses. It can throttle
03:08:21 background accesses at the device. And this was --
03:08:27 and Mr. -- according to Mr. Russell, received by Verizon as
03:08:34 groundbreaking, revolutionary, something that hadn't been

thought of before.

THE COURT: And, Mr. Chang --

MR. CHANG: Yes.

THE COURT: -- has one of your experts opined that any of these slide materials are related to the claims of the asserted patents?

MR. CHANG: Well, yes. I mean -- so what they do is both Dr. Cooklev and Dr. Wesel, they walk through the evidence, including this presentation, to show that Verizon, after receiving this information, shortly thereafter came up with this PCO technology that was suspiciously similar to the information that ItsOn disclosed. And that is the infringing -- accused infringing technology for the '042 patent, as well as the '541 patent and a dependent claim of the '613 patent.

THE COURT: And you may be answering my question, but my question is just whether your experts have said these materials are related to the asserted patents, and --

MR. CHANG: Yes.

THE COURT: -- that's all the relevance I would need. And I'm trying to figure out if I have to arrive at that opinion myself, based on what you're telling me, or if you have an expert opinion in this case that says that.

MR. CHANG: Yes, we do. And as one example, Docket 185-3, the Cooklev report, if you look at

Paragraphs 90 to I think around 110, 116, you will see a lengthy discussion there of the patented features and how Verizon had touted or praised these features. And then ultimately how the evidence indicates that Verizon copied the ItsOn information and ended up infringing the asserted patents.

THE COURT: And what you're showing there now is part of what Mr. Russell says that he saw Verizon discussing back in 2010 or '11?

MR. CHANG: Correct.

THE COURT: Okay.

MR. CHANG: He testifies about that presentation. And if you look at Slide -- yeah, so Slide 7 of my presentation, you'll see -- now, a few months after this April 2010 presentation, that's the presentation we were just looking at, did you learn of troubling conduct by Verizon's employees?

Yes. Well, I saw them put some of this information in Verizon's internal presentation and present it as their own.

THE COURT: All right. And what you pointed me to in -- is it Dr. Cooklev?

MR. CHANG: Yes.

THE COURT: And what was the docket number on that?

03:12:18 MR. CHANG: 185-3.

03:12:28 THE COURT: All right. All right. Thank you, Mr. Chang. I think that's all I really need to hear from the Plaintiff on this.

03:12:33 MR. CHANG: Thank you, Your Honor.

03:12:34 MR. ROSENTHAL: Your Honor, can I go right to that point?

03:12:36 THE COURT: You can.

03:12:37 MR. ROSENTHAL: You asked a question that I thought was very direct, which is does any Headwater expert look at this PowerPoint presentation and connect it in any way to the claims? And Mr. Chang said yes. And he pointed you to Paragraphs 90 to 110 of Dr. Cooklev's declaration. I have those paragraphs here, and I've just read them again. And not a single one of those paragraphs does anything of the kind.

03:13:04 What Paragraphs 90 through 110 do is they -- in fact, we have a Daubert motion on this because they literally have no analysis. This is a section that is entirely factual, no opinions whatsoever. This is a section where Dr. Cooklev goes for 20 paragraphs and sets forth their opening statement.

03:13:29 They say -- he says here's some facts. There is an NDA. They entered into an NDA. They received information. That information included information about

03:13:40 the ItsOn product. The ItsOn product was described in
03:13:43 these details. They took that information. They did
03:13:46 something with it.
03:13:47 At no time does he ever connect this to the claims
03:13:50 because it has nothing to do with the claim.
03:13:52 Now, I heard Dr. -- Dr. Chang, sorry, sounded like
03:13:55 expert testimony. I heard Mr. Chang say about the document
03:14:01 that he believes that it is connected to the claims. But
03:14:03 if you look at these paragraphs -- so Paragraph 90 just
03:14:08 sets it up. It's just throat clearing.
03:14:12 THE COURT: Mr. Rosenthal, given that we're
03:14:14 running out of time, let me just ask -- Mr. Chang, would
03:14:18 you show me where in the paragraphs you think that there's
03:14:23 something that connects in some way this presentation to
03:14:30 the asserted patent?
03:14:49 MR. CHANG: I'm having trouble --
03:15:25 THE COURT: I tell you what, we're really overdue
03:15:29 for the afternoon recess. While you're trying to locate
03:15:33 that --
03:15:35 MR. CHANG: I've got it up actually.
03:15:38 THE COURT: -- we'll go ahead and take the
03:15:41 afternoon recess and then come back and pick up right
03:15:43 there.
03:15:44 Thank you.
03:15:44 COURT SECURITY OFFICER: All rise.

03:15:45 (Recess.)

03:15:45 COURT SECURITY OFFICER: All rise.

03:35:00 THE COURT: Thank you. Please be seated.

03:35:01 Whenever you're ready, Mr. Chang.

03:35:04 MR. CHANG: Thank you, Your Honor.

03:35:05 So I have up on the screen Dr. Cooklev's opening report, again, Document No. 185-3. We're looking at Paragraph 90, and this is the very first paragraph of that entire section in which he talks about that very presentation, and he says: Based on my experience in the telecommunications industry, the extensive interactions Verizon had with Headwater and ItsOn, and the timeline of events discussed below, it is my opinion that Verizon would have been aware of or at least willfully blinded itself to the '042 patent.

03:35:43 And going on to Paragraph 101, he discusses specifically the April 2010 presentation.

03:35:51 102: By May 2011, ItsOn had developed a Verizon-specific DAS platform and conducted field trials to evaluate the platform's effectiveness, including features protected by the '042 patent.

03:36:05 And then he talks about -- you know, to address the issues, Verizon proposed the DAS system remarkably similar to the one that Verizon had trialed just months before, including by extending service usage controls to

the user -- UE, which is the end-user device, and provide customized device behaviors, such as having the UE block background data traffic while allowing foreground data traffic.

And then going down to the end, as another example, he says: It is my opinion that based on the facts above, including the technical documents, et cetera, a POSITA would conclude that Verizon understood that there was a high probability that its device assisted services system infringes one or more Headwater patents and that Verizon deliberately avoided learning of that fact, which is further underscored by Mr. Russell's testimony.

So I submit that there are clear linkages between not only the April 2010 presentation but other information that was provided to Verizon under the NDA which Verizon then took, put in its own presentations, and then ultimately adopted in its network.

THE COURT: All right. Thank you, Mr. Chang.

MR. CHANG: Thank you, Your Honor.

Oh, and sorry, I forgot to mention one other thing. Just to make the record clear, I wanted to mention that Dr. Wesel also has a similar discussion in his report, Appendix A for Verizon, his opening report with respect to the '541 and '613 patents. And that would be Docket 182-6.

Thank you, Your Honor.

03:38:07 THE COURT: All right.

03:38:07 MR. ROSENTHAL: Your Honor, if I can briefly respond to that?

03:38:12

03:38:17 THE COURT: All right.

03:38:18 MR. ROSENTHAL: The question that this MIL presents is whether Mr. Russell can make an allegation or recount his allegation or his belief that Verizon copied an April 2010 presentation. That is the extent of his allegation. That is it. And you heard Mr. Fenster yesterday say that is it, that is all we're alleging with respect to Verizon's copying. That's it. Nothing about the trials. Nothing about anything else.

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03:38:47 And so Your Honor asked a very simple question: Did any expert link that presentation or anything in that presentation to the '042 patent?

03:38:50

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03:38:57 And I just saw four paragraphs that Mr. Chang put on the screen. Not a single one of them did so. Paragraph 90 doesn't mention the presentation at all. He's talking about knowledge in 2016, five years later, and he doesn't cite that presentation, and nowhere does he say here's where it links up to the '042.

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03:39:17 Paragraph 101 has to do with the presentation, but it doesn't link it in any way or discuss the '042.

03:39:20

03:39:24 Paragraph 102 has to do with the field trials. It had nothing to do with the presentation.

03:39:27

03:39:29 And then Paragraph 116 is a conclusion where he
03:39:33 doesn't even link it to the '042. He says: I think that
03:39:36 there was willful infringement of one or more Headwater
03:39:37 patents.
03:39:38 Now, if there were any doubt as to whether
03:39:42 Dr. Cooklev actually did this analysis, I asked him in his
03:39:48 deposition whether he did it. I asked him for -- may I
03:39:52 please have the ELMO? Thank you.
03:39:54 I asked him for a couple pages because he was sort
03:39:57 of being a little bit coy about what I was talking about.
03:40:00 But in his deposition, starting at Page 36, I asked him
03:40:05 over and over again whether he did any analysis about
03:40:10 whether or not the ItsOn proposals or products or software
03:40:15 practiced at all the '042 patent. I mean, he didn't even
03:40:20 understand what I was talking about. He said: I don't
03:40:22 know what you mean by ItsOn.
03:40:24 I mean, he didn't remember having written these
03:40:25 paragraphs.
03:40:26 And I said -- so this is now on Page 37 at 18:
03:40:30 Have you performed any analysis as to whether ItsOn
03:40:33 practiced?
03:40:36 As I stated, ItsOn invented that. Beyond that, I
03:40:39 did not analyze whether ItsOn's proposals or offerings
03:40:44 practiced the claims.
03:40:45 I asked him again: Do you have any opinions as to

03:40:48 whether any of the products that they offered or sold?

03:40:50 And he said: I don't have anywhere in my report
03:40:52 memorized. If somewhere I refer to ItsOn products, point
03:40:55 me to it. I'll be happy to answer. But subject to that, I
03:40:56 didn't think investigating ItsOn's products is at all
03:40:59 necessary for my opinions.

03:41:00 And then the ultimate question on Page 39, Line
03:41:05 14: Do you have an opinion as to whether any of these
03:41:08 practice?

03:41:09 I think we went over it. I don't clearly even
03:41:12 recall what products we're talking about. I don't recall
03:41:14 and I don't think I've ever provided opinions on that, so I
03:41:17 did not investigate that.

03:41:18 They are now trying to tell you that Dr. Cooklev
03:41:23 did some kind of an analysis to link this presentation
03:41:26 about ItsOn's products to the '042 when the man said he
03:41:28 didn't even do that analysis. And it's not in his report.

03:41:31 And so what we have here is a salacious allegation
03:41:35 of copying that stands alone that has nothing to do with
03:41:39 the '042 patent that Mr. Chang wants to do an analysis
03:41:43 himself and explain why he thinks it's relevant to the '042
03:41:46 patent. Totally inappropriate.

03:41:47 The other thing that I'll mention, and this is
03:41:50 just -- you know, I've used the word "trojan horse" both in
03:41:54 the briefs and today, but this is what the '042 patent, by

03:41:57 the way, is in this case for. They're not seeking damages
03:42:00 for the '042 patent. The '042 patent is the subject of a
03:42:03 summary judgment motion which I hope we have a chance to
03:42:05 argue later today, but I doubt it.
03:42:07 THE COURT: I don't think we will.
03:42:08 MR. ROSENTHAL: I doubt it.
03:42:09 But the '042 patent is in this case for this
03:42:13 reason and this reason alone, because it's the only link.
03:42:16 Mr. Chang just mentioned Dr. Wesel. He doesn't talk about
03:42:19 the '042 patent. And you heard and it's in their briefs,
03:42:24 the only allegation that this Russell thing has anything to
03:42:28 do with is the '042 patent. It's the only reason it's in
03:42:31 the case. And there's a reason for that, because the
03:42:34 technology that's accused of infringing the other two
03:42:36 patents wasn't even developed by Verizon. It was developed
03:42:40 by the phone manufacturers. Verizon had nothing to do with
03:42:44 the development of that.
03:42:44 So what they're talking about here is only with
03:42:47 respect to the '042. All of this is tied up with the '042.
03:42:50 And they don't have any evidence that anything that was
03:42:52 being presented has anything to do with the '042 patent.
03:42:56 THE COURT: I notice that the questions you
03:42:59 pointed out from the deposition are all focused on ItsOn
03:43:05 products, and it is apparent that Dr. Cooklev has not
03:43:11 examined the ItsOn products. The documents that we've been

looking at that Mr. Russell is involved with are about the ItsOn technology.

MR. ROSENTHAL: Your Honor, the questions were not limited to products. He specifically -- when I asked him -- and it begins on Page 36. When I asked him about this, he said, you know, what do you mean by the ItsOn products?

So this is up here on Page 36, Line 6.

I said: Well, have you done any analysis of whether anything that ItsOn did practiced the claims?

And he said: Well, one of the things that ItsOn did was actually file the patent.

And so I clarified, and by the time we got to the answer, he made it very clear. He said: I did not analyze whether ItsOn's proposals or offerings -- proposals or offerings.

Now, look, I don't need the deposition testimony to make the point because his report simply does not do it. His report simply does not ever look at the pages that Mr. Chang put up on the screen and say here's how this relates to the '042 patent or even state this relates to the '042 patent.

He simply has 30 paragraphs where he recites the facts that these things happened, and then says: In my view, all of this supports the idea that we willfully

infringe one or more patents.

But he never has any analysis at all that this has anything to do with the patent. That's just made up attorney argument.

And I do think he clearly testified in his deposition that he didn't perform any analysis of ItsOn proposals or ItsOn products. And so what we're left with is an -- and I will say one other thing. Mr. Russell -- and that's what this MIL is about. Mr. Russell made it very clear that here's what he thinks happened. There's an April 2010 presentation, and then later a gentleman named Nem Kashanian put together a Verizon presentation, and he saw some of the same concepts in that presentation.

And Mr. Russell testified unequivocally that never went into any Verizon products. He said: That was a proposal that never went anywhere. It didn't get implemented. It's just a proposal. And he said: As long as I was at the company, it never got implemented. And as far as I know, it never got implemented when I left.

So this is -- this is just sexy. It has nothing to do whether we actually took this stuff and put it into our products, which we didn't.

So this is just so that they -- this is why the '042 is in the case. It's why they're trying to get this -- Mr. Russell testimony in is so that they can use

this word "copying" with the jury. But unless they tie it to the '042 patent, it's not relevant.

And one last point, Your Honor, one last point. When we moved for summary judgment of no copying on the '042 patent, they didn't even raise this as evidence that supports their claim of copying. If it's not relevant enough for them to even raise it, then why should that form a basis for them to get this allegation into the case?

That's all I have, Your Honor.

THE COURT: All right. Thank you, Mr. Rosenthal.

Mr. Chang, would you show me one more time the portion of Dr. Cooklev's report that cited to the '042 in connection with that part of his report that discusses the ItsOn presentation?

MR. CHANG: Yes, Your Honor.

Okay. So I think Mr. Rosenthal keeps focusing on products, products, products. The point here is, setting that aside, the fact that Verizon elicited information under an NDA -- proprietary ItsOn information under an NDA, put that in its own presentation, and then, you know, the evidence indicates that they then at least borrowed some of the ideas to implement its own solution, which is called the PCO solution, to address the very problems that are described throughout the ItsOn presentations is relevant to multiple issues in the case, including, for example,

03:48:30 long-felt need, recognition by one of the industries'
03:48:35 largest carriers, praise by others, copying, and so on.
03:48:44 So setting aside ItsOn's products and whether
03:48:51 Dr. Cooklev analyzed ItsOn products and tried to do a
03:48:56 mapping between ItsOn's products and '042, this is still
03:49:00 highly relevant to many issues in the case.
03:49:00 And so in Paragraph 90, again, he talks about
03:49:03 based on the timeline of events below, including its
03:49:06 discussion of the April 2010 presentation, this shows
03:49:10 Verizon would have been aware of or at least willfully
03:49:13 blinded itself to the '042 patent. And then he says in the
03:49:17 2016 time frame when Verizon defined its LTE PCO
03:49:24 requirements, because that's when it actually implemented
03:49:26 the PCO solution that we say was derived from the
03:49:30 information it got from ItsOn.
03:49:32 So the 2016 time frame point that Mr. Rosenthal
03:49:35 raised has nothing to do with the events that unfolded in
03:49:44 the 2010 timeframe when ItsOn presented that April
03:49:47 presentation to Verizon.
03:49:49 2016 is when Verizon ultimately adopted what's
03:49:54 called the PCO solution, that it actually started proposing
03:49:59 in documents beginning in 2012, just months after it
03:50:05 trialed the ItsOn software in 2011. And we can see that,
03:50:20 for example, in Paragraph 107.
03:50:22 By April 2012, Verizon identified specific network

congestion and customer experience issues that it had been experiencing, some of the very issues Headwater and ItsOn predicted would occur in their 2010 presentations to Verizon. And then it gives some examples of a device pinging issue. I mean, the similarities are remarkable.

And then it goes on: The solution that they proposed in 2012 -- again, just months after the trial -- was a device-assisted services system that uses what's called PCO to control network traffic using the device. And this is one of the core concepts of the patented technology.

THE COURT: All right. I'm also looking at Document 185-3, which is excerpts of the same report of Dr. Cooklev, and I'm satisfied that it shows that there is an expert who is connecting the presentation at issue in Mr. Russell's testimony with the technology in the '042 patent. And, therefore, I'll deny that part of Motion in Limine No. 4.

And, Mr. Rosenthal, I would call on you to identify for me what the agreement is that you said had been reached on the other part of MIL 4.

MR. ROSENTHAL: Your Honor, do you mean to send an email to the Court with that or to repeat it here?

THE COURT: If you think it is too much to accurately dictate into the record, you can do it by email.

03:52:29 MR. ROSENTHAL: I'm happy to say it right now.

03:52:31 So what has been agreed is that there will be no

03:52:35 reference to the complaint that Mr. Russell filed against

03:52:41 Verizon.

03:52:42 There will be no reference to any retaliation that

03:52:46 Mr. Russell believes he was subjected to as a result of

03:52:49 that complaint or as a result of his whistle blowing, no

03:52:54 retaliation at all.

03:52:55 And there will be no reference to, quote, reverse

03:52:58 engineering that was part of his allegations.

03:53:03 And the only other comment I'll make, I understand

03:53:06 and appreciate the Court's ruling right now, is that we

03:53:09 would ask that that, of course, be revisited if the '042

03:53:12 does not go to trial.

03:53:14 THE COURT: All right.

03:53:15 MR. ROSENTHAL: Thank you, Your Honor.

03:53:16 THE COURT: Thank you.

03:53:18 MR. CHANG: Your Honor, just briefly. So we

03:53:21 agree -- Defendant -- I mean, Plaintiff agrees on the

03:53:25 agreed portion of what should get -- be excluded by the

03:53:30 MIL.

03:53:30 We disagree, however, that if the '042 patent --

03:53:34 for example, issues regarding the '042 patent are disposed

03:53:40 of in the case, that somehow that disposes of the evidence

03:53:46 that we've been discussing today.

THE COURT: Well, I'm not going to make a decision on that at this time.

MR. CHANG: Okay. Sure. I appreciate that. Thank you, Your Honor.

THE COURT: All right. That takes us to MIL No. 5.

MR. ROBB: Ma'am, may I ask that the computer be displayed? Thank you.

Thank you, Your Honor. Andrew Robb for Defendants.

MIL No. 5 addresses a couple of issues relating to damages numbers that are prejudicial.

I want to focus the presentation today on one of those issues, which is the issue of post-judgment royalties, and then I'll touch briefly on a couple of others.

On the issue of post-judgment royalties, so for context -- and I'll go briefly because I'm sure Your Honor is familiar with it. Headwater's damages model relies on three steps.

So first Dr. Wesel calculates the data savings associated with devices that Verizon sells that use the accused features.

Next, Dr. Bazelon calculates the total value of the spectrum holdings of the Defendants. I'll note that

this MIL is almost identical between T-Mobile and Verizon, so I'll just refer to Verizon. But the numbers are slightly different, the arguments are precisely the same for T-Mobile. He calculates the total value of Verizon's spectrum holdings. He then determines the data savings associated with the accused devices on a per-year basis and calculates the value of those to the spectrum holdings, again, on a per-year basis, running through the expiration of the patents in 2029. He then sums those year-by-year calculations into a single number, and that is his analysis of the total value of the patents.

Mr. Bergman is their third expert. He's the final damages expert. He simply takes that final total and performs a 75/25 bargaining split where Headwater would get 25 percent of the value.

This is Dr. Bazelon's analysis. This is where he is charting year-by-year for each year. Here is the running value of the accused products that are being sold as applied to the spectrum holdings.

To use one example on the right, he's assuming that the '541 patent is infringed both with respect to background app refresh and low data mode. And under that assumption, he has the column on the right showing year-by-year totals with the grand total at the bottom. That's a straight summation of the year-by-year totals

above.

Mr. Bergman, as I indicated, takes those numbers. They're different because they rely on different assumptions, but you'll note the second number there is the $420 million number. That's just a straight copy from the sums totals that Dr. Bazelon calculated. And he credits Dr. Bazelon as calculating the overall value of the patent, and then Mr. Bergman applies his bargaining split.

One more schedule to show the year-by-year running total of the analyses that Dr. Bazelon and Mr. Bergman performed. These are schedules to Mr. Bergman's report.

And in the first excerpt, we see -- the top right is one of his total damages number that is simply the summation of each of the years through 2029 that Dr. Bazelon calculated, then, of course, with the bargaining split.

He then calculates infringing units, that is the total number of devices sold, and divides those two numbers to come up with a per-unit royalty rate of [redacted].

In the second excerpt, he shows how he calculated the infringing units, and it's small, and I apologize for that, but in the very bottom, it says: Per Dr. Bazelon's analysis, assumes 2024 to 2029, annual units equal 2023 figures.

So in calculating the number of devices sold, he

03:59:07 has actual numbers through 2023, and then he simply uses
03:59:12 those same numbers out through 2029 when the patent
03:59:18 expires.
03:59:19 Now, as Your Honor knows, because most of the
03:59:21 opinions I'm going to cite today were written by Your
03:59:24 Honor, there is a distinction in the law between lump sums
03:59:25 that allow you to capture the full value of the patent and
03:59:27 prohibitions against running royalties post-judgment.
03:59:30 This form of I'm going to have a year-by-year
03:59:35 total and then simply sum that at the end and declare it to
03:59:39 be a lump sum, Your Honor has already addressed this
03:59:42 precise issue in the Samsung I case.
03:59:46 So in the Samsung I case, Headwater's expert was a
03:59:49 gentleman by the name of Mr. Kennedy. Mr. Kennedy, one of
03:59:53 the components of his damages model was what he called a
03:59:56 post-judgment lump sum. To calculate the post-judgment
04:00:01 lump sum, he had a year-by-year schedule that he then
04:00:04 summed together. And there's no dispute -- and I have a
04:00:08 copy of the excerpt of Dr. Kennedy's -- Mr. Kennedy's
04:00:11 report. There's no dispute that it was a year-by-year,
04:00:15 column-by-column demonstration of the purported value of
04:00:20 the patents and that he then summed it and that he called
04:00:23 it a lump sum when doing so.
04:00:25 And Samsung called him on this. They said he's
04:00:30 not actually offering a lump-sum opinion. He's clearly

offering a running royalty disguised as a lump sum because all he's doing is he's taking a running royalty and adding them together at the end. He's simply summing them.

And Your Honor agreed. Your Honor agreed that simply taking what is transparently a year-by-year running royalty through post-judgment to the expiration of the patent is clearly a running royalty post-judgment. That's it.

Headwater in their opposition brief says, well, Mr. Kennedy was not doing a lump sum. He was doing a running royalty. And that's true, he was. But the point is he tried to do exactly what Mr. Bergman is trying to do here where he takes what is transparently a year-by-year running royalty and then summing it and declaring it to be a lump sum.

And that's precisely that -- the mere fact that those numbers are summed does not magically convert them into a lump-sum figure, particularly in light of the problems associated with post-judgment running royalties that this Court has repeatedly recognized, namely that they're inherently speculative.

The case that Headwater cites, which is -- sorry, my papers are out of order. Netlist -- Headwater cites Netlist, draws the same distinction that a number of cases have cited, which is that there's a difference between a

lump sum and a running royalty in that running royalties post-judgment are not permissible. And that's true.

But Netlist never suggests that what Mr. Bergman has done here, which is, again, take what is transparently a running royalty post-judgment and sum those numbers together and include it in the pre-judgment component, converts that into a permissible lump sum.

The one other case that I'll draw Your Honor's attention to is Allergan, which is Your Honor's opinion from 2016. It is 2016 Westlaw 8222619.

That is notable for two reasons. First -- and that case is a case where Your Honor excluded the post-judgment component of a -- of a damages model that -- both pre-judgment and post-judgment on the basis that the post-judgment portion was clearly just a running royalty, even though in the first paragraph of the order, there was an acknowledgement that the -- the post-trial damages range from about 34 to $57 million.

So there, too, there was a summation of the running royalty. But simply taking a calculator and combining a schedule does not convert it into what is a proper damages analysis.

The other thing I'll note about this opinion, Headwater makes an argument of waiver that we did not include this argument in the opening Daubert briefs.

04:03:50 Now, as Your Honor knows, we did include it in the
04:03:53 reply Daubert briefs, but for purposes of this motion, that
04:03:56 is not relevant, because in Allergan, Your Honor held that
04:04:00 opinions on a future royalty that may accrue from
04:04:03 infringement that has not yet occurred is properly
04:04:07 excludable under Rule 702 as being contrary to law, not
04:04:10 helpful to the trier of fact -- so that, of course, is
04:04:13 Daubert -- or such an opinion is simply excludable under
04:04:17 Rules 401 and 402 as irrelevant.
04:04:21 And so the fact that we are presenting this in a
04:04:23 motion in limine as opposed to a Daubert ruling does not
04:04:26 mean that this is not relief that we can be entitled to.
04:04:31 I want to make -- whoops.
04:04:32 I want to make one other point very quickly. So
04:04:36 our motion identifies a number of prejudicial figures,
04:04:42 including industrywide totals, total revenue, et cetera.
04:04:46 Most of those Headwater has agreed that it will not
04:04:49 present.
04:04:49 The one dispute that remains on those is total
04:04:52 spectrum holdings. So this is an excerpt of Dr. Bazelon's
04:04:57 report in the Verizon case. He has summed what is in his
04:05:01 view the total value of Verizon's spectrum holdings at
04:05:06 $155 billion. He then uses that as the starting point for
04:05:13 how he apportions down to the ultimate value -- he does a
04:05:16 proration by year and then applies a distributed version of

Dr. Wesel's findings to come up with the total value.

Our expert disputes portions of this, in particular the spectrum price, the megahertz per pop, which is essentially -- think of it as the dollar per square footage for spectrum. Our expert disputes that, and there's a dispute between the parties about that.

The parties can have that dispute without this total number being presented. This total number is inherently prejudicial at $155 billion. It's not necessary for them to show this table or tables like it where they talk about Auction 97 generated, you know, $57 billion. Right? These massive numbers are not necessary for the schedule or don't need to be displayed to understand the schedule. The relevant schedule is this one where the numbers are still very large but not in the literally hundreds of billions of dollars.

And so for that reason, we would ask that the prejudicially high numbers relating to overall spectrum auction results, company's overall spectrum holdings, et cetera, would be excluded in addition to the large numbers that Headwater has not asked to be excluded -- or has -- sorry, has not opposed agreeing to not discuss.

THE COURT: So tell me again the numbers that you say are left in dispute.

MR. ROBB: The numbers that are left in dispute.

04:06:52 So for purposes of what Dr. Bazelon did, which is -- he's
04:07:02 the one -- the middle step in Headwater's model, the
04:07:09 spectrum price, the dollar per megahertz-pop, which is
04:07:14 essentially the -- think of it as the value per square
04:07:20 footage of their spectrum. So Verizon has billions and
04:07:21 billions of spectrum holding units, and the two competing
04:07:25 spectrum experts look at FCC auction results and come up
04:07:29 with competing spectrum price per megahertz-pop.
04:07:34 So this 2.53 number that you see on the first row
04:07:38 is the disputed number. So our expert calculates it at
04:07:43 about $1.10, which then translates to a much lower spectrum
04:07:45 value. But both our expert and their expert can make the
04:07:49 case simply by relying on the $2.53 without ever showing
04:07:53 the $98 billion or the $155 billion. And I think the
04:07:59 prejudice associated with those numbers speaks for
04:08:02 themselves.
04:08:02 There are, of course, other inputs to the damages
04:08:07 models that the experts dispute. Dr. Wesel and Dr. Jeffay
04:08:12 dispute the data savings per hour. Multiple of our experts
04:08:16 and Dr. Wesel dispute how frequently the features are used.
04:08:19 So there are other disputes.
04:08:20 But for the purposes of spectrum, the one dispute
04:08:23 is the price per megahertz-pop of 2.53 versus, I believe,
04:08:30 it's $1.10.
04:08:33 THE COURT: All right. There are three numbers

that you're seeking to exclude there, the spectrum value at 98 and 57 billion and the total at 155 billion. Those are the three numbers that are still in dispute?

MR. ROBB: Your Honor, I'm so sorry. I have a hearing problem. I couldn't hear you.

THE COURT: I'm sorry. I should have been closer.

On the screen now, you've got three large figures. That's on your Slide 6.

MR. ROBB: Yes, Your Honor.

THE COURT: 98 billion, 57 billion, and 155 billion. Those are the numbers you're seeking to exclude?

MR. ROBB: So essentially, yes, with a couple of caveats.

So, first, we have identified in our motion other numbers, for example, total revenue of the company, total industry revenue, total industry cost, et cetera. Headwater, in their opposition brief, indicated they would not oppose those. So those, I haven't addressed on the understanding that Headwater is not opposing.

For the large spectrum numbers that Headwater is opposing, it's the -- either broken out by category or the sum total. So on this slide, it's 98,007,000,000, with a footnote about why I'm saying that number, 57 billion, and 155 billion.

The reason I had the footnote, the T-Mobile and

Verizon reports are different on this issue in the sense that T-Mobile has a much larger 2.5 gigahertz set of holdings. And so for them, that number is in the billions. And so we're not prejudiced by the $7 million number, but any of the large spectrum buckets or the total is, one, a related category are total spectrum results from the FCC auctions or from private sales.

So, for example, the -- there was an auction in 2021 which generated, I believe, over a hundred billion dollars in revenue, I think. Certainly -- certainly over $50 billion. That total value that the whole industry paid for that giant block of spectrum should be excluded for the same reasons.

Again, the experts can do their disputes about how to calculate the 2.53 versus $1.10 numbers without referring to the total amount at issue at that auction.

THE COURT: Where is that auction figure in your motion?

MR. ROBB: Yes, Your Honor. So two notes here, first, and I apologize for this. On Page -- so I'm looking at the Verizon motion. On Page 14 of the motion, there's a reference to Tables 5 and Table 6. That should be Tables 3 and Tables 4. Table 4 is what we're looking at now.

Second, in the next paragraph, there are examples of citing, for example, the $233 billion raised at FCC

auctions. So, again, the total amount raised at various auctions individually or combined we think are inappropriate.

THE COURT: All right. And as far as your presentation on the running royalty issues you mentioned, are those covered, as well, in your Daubert motion?

MR. ROBB: Your Honor, there was an inadvertent error in our opening Daubert motion where we omitted this argument. We inserted that into our reply brief, and they had the opportunity to address it in the sur-reply. So we think that there's no prejudice the fact that it was not raised in the opening motion.

And, moreover, as I cited, this issue of post-judgment running royalties under the law can be addressed either in a motion in limine or a Daubert ruling.

THE COURT: So the relief that you're seeking with respect to the running royalty issue, the future -- the post-judgment running royalty, is what?

MR. ROBB: That that portion of the sum be essentially truncated, cut off.

So here, where he's calculating transparently a year-by-year running royalty where in the left-hand columns we have the years, that in the middle of 2025, presuming that's when judgment is entered, that essentially 2026 through 2029 would be excluded -- would not be included in

the summation because this is -- the reality of what he's doing is he has two components. He has a pre-judgment and a post-judgment component. And so the $420 million number on the right, as an example, would be reduced by the summation of 2026 through 2029.

THE COURT: You know, the effect of that, I think, would be that if the infringement continued, then the Plaintiff would be entitled to seek a continuing royalty on that by showing that whatever you have done post-judgment is not colorably different than what you were found to have done as infringement?

MR. ROBB: Your Honor, the -- how the parties address that later, I think, is best suited to later.

But, for example, if after judgment Verizon continues to infringe, then there would be a follow-on action where presumably estoppel rules would apply. They would have been adjudged to be an infringer for selling precisely the same products, and they would get an accounting on those products. Of course, if the products change, if it turns out that Dr. Bazelon and Mr. Bergman's analyses change, all that would change the numbers. Or if the parties settle out of court, that would also be an issue to be addressed there.

But the problem with including that here prospectively is the inherently speculative nature of, as

04:16:17 the footnote indicates, simply taking the 2023 numbers and
04:16:23 writing them in in each of the subsequent years.
04:16:25 THE COURT: And does the Plaintiff's expert
04:16:27 contend that his analysis is a running royalty all the way,
04:16:33 or is he trying to take the position that he is arguing for
04:16:39 a lump sum before judgment and this running royalty
04:16:44 thereafter?
04:16:46 MR. ROBB: Your Honor, their experts contend that
04:16:49 this is a lump sum through the life of the patent.
04:16:53 Our point is that in the Samsung case,
04:17:00 Dr. Kennedy -- Mr. Kennedy had the very similar schedules
04:17:03 for post-judgment infringement, summed them together,
04:17:07 called them a lump sum to capture the full value, and
04:17:13 Your Honor said, no, that you can't -- you can't convert a
04:17:16 lump sum to -- sorry, you cannot convert a running royalty
04:17:23 into a lump sum simply by taking what is transparently a
04:17:28 running royalty and adding those numbers together.
04:17:30 THE COURT: All right. Thank you, Mr. Robb.
04:17:33 MR. ROBB: Thank you, Your Honor. If there's not
04:17:34 anything else, I'll rest.
04:17:41 MR. HOFFMAN: Your Honor, may I approach with some
04:17:43 slides?
04:17:44 THE COURT: Yes.
04:18:15 MR. HOFFMAN: Your Honor, Adam Hoffman for
04:18:17 Headwater.

04:18:17 So as we -- I think we see that these are -- this
04:18:22 MIL is two entirely separate motions, one of which has to
04:18:27 do with large numbers and one of which has to do with a
04:18:31 misrepresentation about what the experts' opinions are in
04:18:36 this case for Headwater.
04:18:38 Taking the large number part first. As I think
04:18:41 Your Honor saw here with a shifting recitation of what
04:18:46 large numbers are at issue and what aren't, saying that
04:18:50 certain tables were at issue in the motion and now certain
04:18:53 other tables are at issue in the argument, simply positing
04:19:00 that large numbers are bad is not an enforceable MIL. And
04:19:06 to the degree that there's a specific argument about a
04:19:08 specific document or number, those should be addressed on a
04:19:12 number-by-number basis.
04:19:14 The Federal Circuit held in Elbit, made very clear
04:19:18 that cases like Uniloc and LaserDynamics are not simply
04:19:23 rules that large numbers cannot be presented to the jury.
04:19:26 The Court has to look at the specific use in each of those
04:19:31 instances. And in particular, what's prohibited is using
04:19:36 the large numbers to make -- to argue that what's being
04:19:39 asked for in damages is a small portion of that.
04:19:43 They haven't presented any indication of any of
04:19:48 the experts making such an argument because they don't.
04:19:51 The numbers that are used are integral to their opinions
04:19:58 and necessary to explain how they calculate their opinions.

If we can go to the next slide, please.

So one of the numbers that apparently they are trying to exclude is the amount that is -- the amount that was obtained through FCC auctions. Dr. Bazelon was also a witness -- expert witness in Finesse shown here. This exact issue was addressed in Finesse. Because those amounts of those auctions was the basis of his spectrum savings model, it was relevant -- those numbers were relevant to his calculations, and there was no -- therefore, no basis to say that he was using those numbers simply to skew the horizon or to mislead the jury. He was using them because they were the necessary evidence.

That's also the case here.

THE COURT: Good. Tell me how Dr. Bazelon is using the spectrum value numbers and the spectrum auction amounts.

MR. HOFFMAN: Okay. So Dr. Bazelon uses the auction amounts, and he combines those with other FCC data relating to populations in the -- populations and the particular licenses granted to various parties to use those -- the real-world evidence of the auction amounts to calculate -- and I guess we can go to the next slide because this was the one -- to calculate these numbers, the spectrum price. Those are direct results of the input of the FCC auction data and the population data. In other

words, the FCC auction data is the real-world evidence that is the starting point and basis for his opinion.

The biggest dispute in this case between Dr. Bazelon and their counter expert, Dr. Hazlett, is them saying you used the wrong -- the wrong auctions. You should have looked at these other auctions because the auctions are the basis of the opinion.

So to say that the auction amounts are irrelevant to his opinion or improper to present is to say that he's unable to put into evidence the real-world evidence upon which his opinion is based and which is, of course, necessary to establish that his opinions are tied to the evidence of the case.

The second point I'd like to make is that the number here, the 155 billion number, that is the basis of his calculation of spectrum savings.

If we can go to the next slide, please.

He uses a formula whereby he takes various inputs, including Dr. Wesel's estimate of what the technical benefit of the patents is, but also uses other percentages to, for example, exclude instances where Verizon or T-Mobile didn't sell the phone, the user brought their own phone. He applies these various things to come up with an overall factor, an overall percentage factor, which he then applies to the spectrum value. In other words, the 155

billion, that is the number to which he applies his factor analysis. And in the absence of that number, he is unable to explain to the jury how he calculates any of his numbers.

If you'll go to the next slide, please.

There's a claim here that this is a running royalty. It's just not. There seems to be a position taken by Verizon and T-Mobile in this case that lump sums cannot be based on extent of use over time, even though that's literally the law that that's what patent damages are based on.

Dr. Bazelon annualized that 155 million (sic), in other words, he broke it up over the years, because Verizon obtained spectrum at different times. And also spectrum, he wanted to -- as is required, he wanted to look at the discount factor and the effect of the discount factor of the value of that spectrum over time.

So he annualized that overall number to arrive at a number for each year so that he can accurately both reflect the extent of use and so that he can fairly give -- give the Defendants credit for the discount factor as really he's required to do.

But this merely just shows the extent of use. And then he does add up the various values over time and comes up -- this is not a royalty, by the way. This is an

opinion on the value of the saved spectrum, the spectrum that is saved directly incrementally as an effect of infringement.

So I guess I'm at a loss at what an expert could possibly do to have a lump sum that reflects accurately changing value over time and extent of use over time, because apparently if they break it up by year, according to Defendant, they, therefore, can only have a running royalty, because as Your Honor knows, particularly in this court, where the opinion of the expert is that a lump sum -- that that's a lump sum, and more importantly where the jury awards a lump sum, that award is for the entire life of the patent.

And to be very clear, all the experts in this case opine on a lump sum. Nobody is opining on a reasonable royalty. The only thing going to the jury is a lump sum. If the jury awards a lump sum that ignores any post -- any post-trial infringement, then that simply deprives Headwater of the vast majority -- or not the vast majority, of a significant portion of the damages that would be considered -- should be considered and at the hypothetical negotiation would, of course, be considered because at the hypothetical negotiation all parties agree the parties would be negotiating a license through the expiration of the patents.

04:26:49 Another way to think of this is it's clear that
04:26:52 under this Court's precedence, that it is appropriate to
04:26:57 consider post-trial infringement and the resulting benefit
04:27:02 of that infringement as part of a lump-sum analysis. They
04:27:07 don't seem to dispute that.
04:27:09 How would that be possible -- according to them,
04:27:12 you can't look at that on a year-by-year basis. You can't
04:27:16 consider what that benefit is over years. You have to
04:27:17 somehow -- actually I don't even know what they're talking
04:27:19 about. You have to do projections without doing
04:27:22 projections by year, according to them, which just simply
04:27:25 isn't even possible.
04:27:26 This very clearly is nothing like the 422 case,
04:27:31 the Headwater I case. There, there was no dispute at all
04:27:35 that Dr. Kennedy was opining that the reasonable royalty in
04:27:40 the case was a running royalty. He never opined that the
04:27:44 reasonable royalty was a lump sum.
04:27:46 He opined that -- that if the Defendants argued
04:27:50 for a lump sum, that it is -- it would be necessary,
04:27:56 therefore, for the jury to consider future post-trial use,
04:28:02 and he therefore calculated that future use as a -- as a
04:28:07 sort of anticipatory rebuttal.
04:28:09 But that was not his opinion, and that's your
04:28:13 court excluded it, because you said you have a reasonable
04:28:18 royalty opinion, and you can't have a reasonable royalty

04:28:20 opinion and then also calculate post-trial damages.

04:28:24 THE COURT: I am going to defer that side of this
04:28:30 motion to the Daubert motion addressing the Plaintiff's
04:28:37 damages. So what I do want to discuss with you just is the
04:28:48 use of the figures that the Plaintiff is complaining about.
04:28:54 I'm looking at what is your Slide 6 on this MIL 5.

04:29:02 MR. HOFFMAN: Yes, Your Honor.

04:29:03 THE COURT: The one that has the 98, 7, and 57
04:29:07 adding up to 155.

04:29:12 Does Dr. Bazelon calculate those spectrum price
04:29:25 dollars per megahertz, whatever, at that level, or is it
04:29:32 calculated on many years that add up to what's shown on
04:29:36 Slide 6?

04:29:37 MR. HOFFMAN: He calculates it at this level, and
04:29:40 then he annualizes that number. He takes the 155 billion
04:29:45 and then spreads it over the years based on the extent of
04:29:49 use and based on the discount factor for the depreciation
04:29:54 of that value over time.

04:29:55 So then -- so this is -- this is the number he
04:30:03 gets from his analysis of the auction pricing and which he
04:30:08 then annualizes.

04:30:10 THE COURT: So tell me what -- all right. You're
04:30:19 looking -- I see. You're looking at a different slide than
04:30:22 I am.

04:30:23 MR. HOFFMAN: Yes, Your Honor. I think you were

referring to my Slide 4 when you were asking about the 98 million -- 98 billion --

THE COURT: It says 6 on the copy I'm looking at.

MR. HOFFMAN: Oh, I'm sorry, Your Honor.

But in any case, it should say Table 3 if that's the one you were asking about. The numbering might have gotten messed up. This is the one you were just asking about, correct, Your Honor?

THE COURT: That is the one I was asking about. So I don't understand how the numbers work on that to generate the result. It looks like that's more of a composite.

MR. HOFFMAN: Well, so because the auctions take place for different bands, there's three different numbers because there's different inputs in terms of the auction prices for those different bands. So you have three different numbers for the value of Verizon's holdings at those three different bands. He then adds those together to get the value of the total holdings.

He then -- if we can go to -- two slides forward.

THE COURT: Where does he get those numbers from, the 98, the 7, and the 57?

MR. HOFFMAN: He gets them by deriving from the auction price number the prior column for the megahertz-pop number and then applying that to the extent of

infringement.

THE COURT: So why does he need to add it up to those figures before breaking it down?

MR. HOFFMAN: Well, these are all, I think -- he's a Ph.D. in economics and sometimes takes -- his explanations are very complicated. My understanding is that in his mind, the most accurate way in which to determine this is to determine the total value and then using that total value then annualize that value from that starting point. I mean, that's his methodology.

And I think that goes to another issue here, which is whether this is essentially a Daubert motion rather than a MIL.

THE COURT: I'm just looking at whether he needs to put that $155 billion figure in front of the jury. And I'm trying to understand the role it plays in his analysis. But it appears that he's starting with it, not using it.

MR. HOFFMAN: I mean, you're correct, Your Honor, in that it is a -- it is a starting point to which then other apportionment factors are applied.

However, in explaining his opinion to the jury and having the jury understand how he arrives at the numbers he does and be able to evaluate the credibility of that to cut out steps in his analysis undermines his ability to present his opinion -- his entire opinion and to explain it fully

to the jury.

THE COURT: Where does his analysis start?

MR. HOFFMAN: It starts from the spectrum value at the various bands, so the 98 billion, the 7 billion, and the 57 billion, which added together is the total spectrum value, which he then goes through a fairly complicated calculation to take that total value and spread it over the life of the patents, again, so he can take into account the discount factor that reasonably would apply at the hypothetical negotiation, as well as the time at which Verizon and T-Mobile obtained that spectrum.

So I think Your Honor is correct in that conceivably, he could start at Table 5-8, where -- starting from the annualized numbers. But without able to -- he wouldn't be able to explain to the jury how he gets there from the auction pricing without explaining the intermediary steps.

THE COURT: Well, what auction pricing is reflected in that Table 3?

MR. HOFFMAN: Table 3 reflects -- as you can see, there are footnotes there. So it reflects Auction 97 and Auction 107. Those were two separate auctions for two separate bands. And that's the source of the data which when combined with population data he used to calculate the spectrum price in the middle column there, the dollar per

megahertz per population.

So if you look at this, the Footnote 1 and 3 here, that's the starting point of his analysis, the real-world evidence of the market price for spectrum, which he then uses to, through several steps, come up with the value -- the value of Defendants' spectrum.

THE COURT: All right. And the amounts raised in the various spectrum auctions, which was the other issue raised, those are numbers that he turns into these -- that calculation in Footnote 2?

MR. HOFFMAN: I think Footnote 2 only refers to that particular band where because there's -- there isn't direct auction data, he kind of has to do some additional calculations, and he explains what those are there.

This doesn't show the sort of formula of his calculation for how he takes the input of the auction price and from that calculation total value.

But I don't believe, Your Honor, that there's any dispute that the starting point of his analysis and the basis of his numbers, the real-world evidence upon which his numbers are based are the auction pricing.

And, again, the main dispute between the experts on this issue is not whether that's an unreasonable starting point but whether he -- which auctions to look at, that Dr. Bazelon believes that the two auctions shown here,

the 97 and the 107, are the most comparable and relevant ones. And their expert, Dr. Hazlett, thinks that other ones are more relevant. But they're both essentially starting from the same place in terms of the kind of data that they're looking at.

THE COURT: Dr. Bazelon's report is in the record at -- as Exhibit 12; is that right?

MR. HOFFMAN: Your Honor, I don't have -- yes, Your Honor, Exhibit 12.

And also I'd point out that not just this issue -- sorry, not just the issue about post-trial damages but also -- or post-trial infringement but also this issue that's specifically about this large number issue is also addressed in the Daubert briefing.

So in Verizon, that's Docket 216 and 212, two different ones because there's motions against both Mr. Bergman and Dr. Bazelon. And in the T-Mobile case, at Docket 205 and 209.

THE COURT: All right. And I'm going to carry MIL No. 5 and look at it in connection with the Daubert and with Dr. Bazelon's report and make a determination about both issues.

MR. HOFFMAN: Thank you, Your Honor.

MR. ROBB: Your Honor, if I may, I don't have anything of substance to say, but I'd like to offer

something.

THE COURT: All right.

MR. ROBB: I have with me excerpts of Mr. Kennedy's report from the original Samsung case, which is the basis of the ruling in that case that we think applies here. If I could provide a copy to counsel and to Your Honor?

THE COURT: All right.

MR. ROBB: Thank you, Your Honor.

MR. HOFFMAN: And, Your Honor, in terms of what you've just been handed, I would just direct you to Paragraph 433 on the first -- the first page which makes it clear that what Dr. Kennedy was doing was not what Dr. Bazelon was doing.

THE COURT: All right. I will consider that, as well.

I'm going to grant the Defendants' motion for leave to take up their sixth motion in limine, and I'd like to hear from counsel about that now. I understand that there is some measure of agreement, but I understand Plaintiff has some concerns about it?

MR. GORHAM: Yes, Your Honor. Tom Gorham on behalf of Defendants.

I'm pleased to announce that we worked out an agreement over the lunch hour. If I may approach the bench

and hand up a paper that displays the structure of the agreement. And I have a couple of additional comments, as well.

THE COURT: All right.

MR. GORHAM: Thank you.

So, Your Honor, what I've handed up is Docket Entry 262 in the 379 case. And in the right-hand column, what is shown is Headwater's requested clarifications to Defendants' proposed MIL No. 6.

And over the lunch hour, we met and conferred about Headwater's proposed clarifications. We have agreed with these clarifications with a few of -- a few additions of our own.

And my question for Your Honor is how would you like for us to present these to the Court for implementation, if the Court is willing to do so? It might be a little bit difficult to read the entirety of the agreed-to MIL with the edits from the podium. And in lieu of doing that, I'm happy to email the Court the language that the parties have agreed to.

THE COURT: And the language that would be added is what is handwritten on the copy of what was handed to me?

MR. GORHAM: That's correct, and I've shown that to opposing counsel before I approached the bench.

04:42:27 THE COURT: That is fine. Why don't you go ahead
04:42:29 and email that --
04:42:29 MR. GORHAM: Okay.
04:42:30 THE COURT: -- and we'll make sure that it gets
04:42:34 into the order on the MILs.
04:42:36 MR. GORHAM: Okay. And one comment -- perhaps two
04:42:42 comments on behalf of the Defendants as to what is driving
04:42:45 these edits, Your Honor.
04:42:47 Headwater's proposed clarification -- and I'm
04:42:51 looking now at the second proposed clarification -- asks a
04:42:55 party is permitted to question the opposing party's
04:43:00 corporate representative at trial regarding that opposing
04:43:02 party's positions taken in the litigation and at trial. It
04:43:08 was the language "the positions taken in the litigation at
04:43:12 trial" that Defendants thought was a little too broad --
04:43:15 actually a lot too broad.
04:43:16 So we proposed the two clarifications to narrow
04:43:19 the scope of that area for which Plaintiff is allowed to
04:43:24 question our corporate representative. And that was the
04:43:28 principal animating factor behind that edit, Your Honor.
04:43:34 THE COURT: All right. That it is relating to the
04:43:39 opposing party's high-level positions?
04:43:45 MR. GORHAM: Yes, exactly.
04:43:46 THE COURT: And regarding infringement,
04:43:49 invalidity, and damages?

04:43:50 MR. GORHAM: Yes, sir.
04:43:51 THE COURT: All right. I understand that.
04:43:55 MR. GORHAM: Thank you. I have nothing further,
04:43:56 and I will email the document to the Court. Thanks.
04:44:00 THE COURT: All right. Thank you, Mr. Gorham.
04:44:03 Obviously, we are not going to finish the exhibits
04:44:15 for the Verizon case, and we still have matters to take up
04:44:20 regarding T-Mobile. I'm not quite as worried about the
04:44:26 timing on the T-Mobile matters because I -- it is not going
04:44:30 to go to trial before Verizon.
04:44:32 I guess theoretically Verizon could settle and
04:44:39 leave T-Mobile first.
04:44:40 I'm looking at the people who would know that.
04:44:44 MR. ROSENTHAL: I think Verizon will go first,
04:44:46 Your Honor.
04:44:46 THE COURT: All right. I'm counting on that.
04:44:51 Then I've got a couple of options. We don't have
04:45:01 tremendous flexibility, but on Thursday and Friday of next
04:45:06 week, I've got time to take up the exhibits. It does not
04:45:12 require everybody to come back, just whoever you entrust
04:45:16 with the exhibit issues.
04:45:20 It looks like, frankly, the parties have gotten
04:45:25 the exhibits down to a fairly manageable number, and I will
04:45:31 make an effort to get a ruling out on the MILs that we have
04:45:37 taken under advisement, although not necessarily the ones

that are deferred to another substantive motion.

But if counsel want to consult their calendars and let Ms. Asbel know before you leave here which of those two days work best for you, and then we can at least finish up the exhibits for Verizon and hopefully launch into issues for the T-Mobile case, as well.

I am assuming that a lot of what we've done will apply to the T-Mobile case, as well.

MR. DACUS: Your Honor --

THE COURT: Yes.

MR. DACUS: -- on the Thursday and Friday of next week, I show on my calendar Friday of next week is the AT&T-Headwater pretrial. Am I --

THE COURT: That's in the morning.

MR. DACUS: So that one will be done by noon?

MS. FAIR: Your Honor, if I may. We have spoken with AT&T's counsel about whether it makes sense, because a lot of the issues do overlap, to go ahead and finish the Verizon issues before we get to AT&T. And so I don't know -- we've floated this idea with everyone of supplanting the AT&T pretrial next Friday with a continuation of this hearing. I don't want to speak for Verizon, T-Mobile, and AT&T on that, but from our perspective, that would -- that would work just fine.

THE COURT: Well, I -- that makes sense.

04:47:17 Is that -- that would mean we have the day, and I
04:47:20 know we'd accomplish quite a lot.
04:47:24 MR. KREVITT: Your Honor, if we could just huddle,
04:47:26 as you suggested, on schedules --
04:47:26 THE COURT: Okay.
04:47:28 MR. KREVITT: -- because we have not had an
04:47:30 opportunity to consider that, and we'll --
04:47:32 THE COURT: All right.
04:47:32 MR. KREVITT: We understand Thursday and Friday
04:47:34 are available, and I'm sure we can make one of those work.
04:47:37 THE COURT: All right. Well, I know we had a
04:47:40 variety of other matters on the agenda, but I think we'll
04:47:43 just carry all of those over to next week.
04:47:47 And if you are able to arrive at a decision on the
04:47:50 date before you leave, that'd be helpful, and let us know.
04:47:56 MS. FAIR: Does that include the potential for
04:47:58 Friday morning if the parties are all agreeable to the
04:48:01 Verizon issues being taken up that morning, or is the Court
04:48:04 wanting to keep AT&T on calendar there?
04:48:06 THE COURT: I am quite willing to move it. And it
04:48:13 looks like I'm hearing from Mr. Saltz that we may have a
04:48:20 motion hearing in that case on that date. We would move
04:48:24 that, as well.
04:48:24 MS. FAIR: Yes. That would be something I think
04:48:25 we would contemplating moving, as well. I know that was

also part of what was set Friday morning. But since we have counsel for all three of the carriers and Headwater here, if the Court's amenable to being flexible, we can reach an agreement and get with Ms. Asbel about that --

THE COURT: All right.

MS. FAIR: -- if that's all right with the Court?

THE COURT: Yes, I think that sounds good, and I will let you confer.

Thank you.

MR. KREVITT: Thank you, Your Honor.

MR. ROSENTHAL: Thank you, Your Honor.

COURT SECURITY OFFICER: All rise.

(Hearing concluded at 4:48 p.m.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes 6/2/2025
SHELLY HOLMES, CSR, TCRR Date
CERTIFIED SHORTHAND REPORTER
State of Texas No.: 7804
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